



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 432 085



UNIVERSITY OF MICHIGAN
LIBRARY

May 1

48

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS.

REPORTER:

LLEWELLYN J. GRAHAM.

0

VOL. LXXIII.

FEBRUARY 10, 1906—MAY 12, 1906.

STATE PRINTING OFFICE,
TOPEKA, 1907.

3333

ENTERED ACCORDING TO ACT OF CONGRESS, IN THE YEAR 1907, BY
LLEWELLYN J. GRAHAM, Reporter,
For the benefit of the State of Kansas,
In the office of the Librarian of Congress, at Washington.

JUSTICES OF THE SUPREME COURT

DURING PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE:

HON. WILLIAM A. JOHNSTON, . . . Minneapolis.

JUSTICES:

HON. ADRIAN L. GREENE, . . . Newton.

HON. ROUSSEAU A. BURCH, . . . Salina.

HON. HENRY F. MASON, . . . Garden City.

HON. CLARK A. SMITH, . . . Cawker City.

HON. SILAS W. PORTER, . . . Kansas City.

HON. CHARLES B. GRAVES, . . . Emporia.

OFFICERS:

Clerk, . . DELBERT A. VALENTINE, Clay Center.

Reporter, LLEWELLYN J. GRAHAM, Topeka.

Librarian, JAMES L. KING, . . . Topeka.

Atty.-Gen., FRED S. JACKSON,* . . . Eureka.

SESSIONS:

THE Supreme Court meets for the hearing of causes in every month but August and September, each session beginning on the first Monday of the month, except the January and July sessions, which begin on Tuesday.

* Succeeded CHILES C. COLEMAN, whose term expired January 14, 1907.

JUDGES OF THE DISTRICT COURTS

AT THE PRESENT TIME (JUNE, 1907).

Dist.

1.....	HON. JAMES H. GILLPATRICK.....	Leavenworth.
2.....	HON. BENJAMIN F. HUDSON.....	Atchison.
3.....	HON. ALSTON W. DANA.....	Topeka.
4.....	HON. CHARLES A. SMART.....	Ottawa.
5.....	HON. FREDERICK A. MECKEL.....	Cottonwood Falls.
6.....	HON. WALTER L. SIMONS.....	Fort Scott.
7.....	HON. LEANDER STILLWELL.....	Erie.
8.....	HON. OSCAR L. MOORE.....	Abilene.
9.....	HON. PETER J. GALLE.....	McPherson.
10.....	HON. WINFIELD H. SHELDON.....	Paola.
11.....	HON. CORB A. MCNEILL.....	Columbus.
12.....	HON. WILLIAM T. DILLON.....	Belleville.
13.....	HON. GRANVILLE P. AIKMAN.....	El Dorado.
14.....	HON. THOMAS J. FLANNELLY.....	Independence.
15.....	HON. RICHARD M. PICKLER.....	Smith Center.
16.....	HON. ELMER C. CLARK.....	Oswego.
17.....	HON. WILLIAM H. PRATT.....	Phillipsburg.
18.....	HON. THOMAS C. WILSON.....	Wichita.
19.....	HON. CARROLL L. SWARTS.....	Arkansas City.
20.....	HON. JERMAIN W. BRINCKERHOFF...	Lyons.
21.....	HON. SAM KIMBLE.....	Manhattan.
22.....	HON. WILLIAM I. STUART.....	Troy.
23.....	HON. JACOB C. RUPPENTHAL.....	Russell.
24.....	HON. PRESTON B. GILLETT.....	Kingman.
29.....	HON. J. McCABE MOORE.....	Kansas City.
30.....	HON. ROLLIN R. REES.....	Minneapolis.
31.....	HON. GORDON L. FINLEY.....	Dodge City.
32.....	HON. WILLIAM H. THOMPSON.....	Garden City.
38.....	HON. CHARLES E. LOBDELL.....	Larned.
34.....	HON. CHARLES W. SMITH.....	Stockton.
35.....	HON. ROBERT C. HEIZER.....	Osage City.
36.....	HON. MARSHALL GEPHART.....	Oskaloosa.
37.....	HON. OSCAR FOUST.....	Iola.
38.....	HON. ARTHUR FULLER.....	Pittsburg.

JUDGE OF THE COURT OF COMMON PLEAS OF WYANDOTTE COUNTY,

HON. WILLIAM G. HOLT, Kansas City.

OFFICERS OF UNITED STATES COURTS, DISTRICT OF KANSAS.

ASSOCIATE JUSTICE, SUPREME COURT:

HON. DAVID J. BREWER..... Washington, D. C.

JUDGES OF THE CIRCUIT COURT OF APPEALS:

HON. WALTER H. SANBORN..... St. Paul, Minn.

HON. WILLIS VANDEVANter..... Cheyenne, Wyo.

HON. WILLIAM C. HOOK..... Leavenworth, Kan.

HON. ELMER B. ADAMS..... St. Louis, Mo.

JUDGE OF THE DISTRICT COURT:

HON. JOHN C. POLLOCK..... Winfield.

DISTRICT ATTORNEY:

HON. HARRY J. BONE..... Ashland.

MARSHAL:

HON. WILLIAM H. MACKEY, JR.... Junction City.

CLERK OF THE CIRCUIT COURT:*

GEORGE F. SHARITT..... Topeka.

CLERK OF THE DISTRICT COURT:*

MORTON ALBAUGH..... Kingman.

The terms of the CIRCUIT COURT are held as follow:

FIRST DIVISION: At *Leavenworth*, on the first Monday of June; at *Topeka*, on the fourth Monday of November; at *Kansas City*, on the second Monday of January and the first Monday of October (no jury in October).

SECOND DIVISION: At *Wichita*, on the second Monday of March and the second Monday of September.

THIRD DIVISION: At *Fort Scott*, on the first Monday of May and the second Monday of November.

The terms of the DISTRICT COURT are held as follow:

FIRST DIVISION: At *Topeka*, on the second Monday of April; at *Leavenworth*, on the second Monday of October; at *Kansas City*, on the second Monday of January and the first Monday of October (no jury in October); at *Salina* (by consent or special order), on the second Monday of May.

SECOND DIVISION: At *Wichita*, on the second Monday of March and the second Monday of September.

THIRD DIVISION: At *Fort Scott*, on the first Monday of May and the second Monday of November.

* Clerk's office, first division, at Topeka; second division, at Wichita; third division, at Fort Scott.

RULES OF THE SUPREME COURT.

Effective July 15, 1907.

NOTE.—The rules are published at this time especially on account of the addition to Rule 10, requiring abstracts of the record to be printed in all cases submitted after the July session, 1907. Other changes have been made, however, since the publication of the rules in volume 66 of the Kansas Reports, particularly in rules numbered 7, 8, 18, and 20.

No. 1. Sessions. The court will meet for the hearing of causes on the first Tuesday in January and July and on the first Monday in other months, except when such dates fall on a legal holiday; then on the day following. Forenoon sittings will commence at 9:30 and afternoon sittings at 2:00 o'clock. No sessions will be held in August and September.

CERTIFICATION AND CORRECTION OF RECORDS.

No. 2. Clerk's Certificate to Transcripts. Transcripts may be certified by the clerk of the district court substantially in the following form:

State of Kansas, County of ____.

I, _____, clerk of the district court for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above-entitled cause.

In testimony whereof, I have hereunto set my hand and seal, this _____ day of _____, 190—, Clerk.

No. 3. Correction of Errors in Transcripts. For the purpose of correcting any defect in a transcript, either party may suggest the same in writing, and upon good cause shown obtain an order that the proper clerk certify to this court the whole or the part of the record required. If the alleged defect be not admitted by the adverse party, the suggestion must be accompanied by an affidavit showing its existence.

No. 4. Certification of Case-made. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned, judge of the district court of _____ county, Kansas, hereby certify that the foregoing was presented to me as a case-made in the action above entitled, [*here recite the facts with references to the appearance of parties and the suggestion of amendments,*] and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand, at _____ in _____ county, this _____ day of _____, 190—.

Attest: _____, Clerk.

_____, District Judge.

COMMENCEMENT OF PROCEEDINGS.

No. 5. Fees—Security. No cause shall be docketed, except one brought by the state, until the plaintiff in error or appellant shall pay to the clerk five dollars advance fees; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk, conditioned for the payment of all costs for which the party instituting the proceeding may be liable, or, in lieu thereof, a cash deposit, to be fixed by the clerk; nor shall any practicing attorney be accepted as surety on any bond filed in this court.

No. 6. Original Cases—Affidavit. In all original actions or proceedings instituted in this court it shall be necessary for the

plaintiff or applicant for the writ to state fully, by affidavit, the reasons why the action or proceeding is brought in this court instead of one of the inferior courts having concurrent jurisdiction.

No. 7. Record—Paging—Indexing. Counsel for plaintiff in error or appellant shall number the pages of the record, and shall fully index the pages, showing the pleadings, testimony, instructions, verdict, findings, and all other material parts of the record, before the clerk shall receive or file it. When exhibits are referred to in the index, it shall not be sufficient to designate them by numbers or letters, but, in addition, the nature of the document or paper shall be stated briefly.

No. 8. Files — Indorsement — Preservation. Before any paper may be filed in this court the party presenting the same shall fold it and indorse thereon the number and title of the same, and a brief statement of the nature thereof, and the clerk shall keep all papers in a package on which shall be indorsed the title and number, corresponding with those on the appearance docket and journal where the orders in such cases are entered. Firm names of attorneys shall not be used in signing briefs or papers filed in this court.

ASSIGNMENT OF ERRORS.

No. 9. Assignment of Errors in Criminal Cases. In all appeals in criminal cases the appellant must attach to, and file with, the transcript of the record an assignment of errors, which shall distinctly specify each ground of error relied on and the particular ruling sought to be reviewed. Any error or ruling not so specified will be deemed to be waived.

ABSTRACTS AND BRIEFS.

No. 10a. Abstracts. The plaintiff in error or appellant shall prepare a printed abstract of the record, which shall reproduce such portions thereof as it is necessary to read in order to arrive at a full understanding of the questions presented for review, so that no examination of the record itself need be made in this court. If the defendant in error or appellee shall claim that such abstract is incomplete for the purpose stated or is inaccurate, he shall furnish a counter abstract correcting any such omissions or inaccuracies. A party need not include in his abstract all the evidence in order to support a claim on his part that it does not show or tend to show a certain fact, but when such a question is presented the adverse party shall print so much of the evidence as he claims to have that effect. The abstracts shall state only the substance of those parts of the record the bearing of which upon the case can be clearly shown in this manner; such as are purely formal or otherwise immaterial shall be omitted altogether; but quotations must be made with verbal accuracy whenever the decision of any question in controversy may be affected thereby. Abstracts shall be indexed and shall refer to the pages of the record. The amounts necessarily paid for printing them shall be taxed as costs.

No. 10b. Briefs. The brief for plaintiff in error or appellant shall be printed, and contain, with pertinent references to the pages of the abstract: (1) A full statement of the essential facts of the case—this requirement not to be construed to necessitate the duplication of matter already printed in the abstract; (2) a specification of the errors complained of, separately set forth and numbered; (3) the argument and authorities in support of each point relied on, in the same order. The brief of the

appellee or defendant in error shall also be printed, and contain, with pertinent references to the pages of the abstract: (1) Any points made challenging the right of the plaintiff in error or appellant to be heard; (2) a full statement of any additional facts shown by the abstracts and deemed essential; (3) citations of authorities and discussion of alleged errors, in the same order as in the brief of the plaintiff in error or appellant.

No. 11. Printing—Type—Pages. Briefs and abstracts shall be printed from long primer or small pica type, the size of the type page to be 22 by 41 pica ems, on a leaf 6 by 9 inches, corresponding with the Kansas Reports. The clerk shall deliver one copy of each brief to the librarian, to be bound, indexed, and placed in the state library.

No. 12. Service—Filing. In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief and abstract to opposing counsel at least forty days before the time set for argument, and ten days before such time shall file twenty copies with the clerk; and the counsel for defendant in error shall furnish a copy of his brief and abstract, if any, to opposing counsel ten days before the time set for argument, and before such time shall file twenty copies thereof with the clerk. Proof of service of briefs and abstracts must be filed with the clerk prior to the submission of the cause. In case of failure to comply with this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment.

No. 13. Service—State Cases. In all causes in which the state is a party, or interested, counsel shall serve briefs on the attorney-general, such service to be made as provided in Rule 12. In all criminal causes, counsel for the appellant shall furnish a copy of his brief and abstract to opposing counsel at least twenty days before the time set for argument, and file twenty copies thereof with the clerk before that time; and counsel for appellee shall furnish a copy of his brief and abstract, if any, to opposing counsel five days before the time set for argument, and file twenty copies thereof with the clerk before that time.

MOTIONS.

No. 14. In Writing—Notice. Orders for amending or completing records, or for reviving, reinstating, continuing, advancing or dismissing causes, will be made only upon written motions stating fully and specifically the grounds therefor, and at least ten days' notice thereof must be served on the opposing counsel, specifying the day upon which the same will be heard. Such motions, together with the proof of the service of notice, must be filed with the clerk three days before the time fixed for the hearing.

HEARING OF CAUSES AND MOTIONS.

No. 15. Assignment—Advancement. Causes will be assigned for hearing as nearly as practicable in the order of their filing, except as otherwise provided by law, but any cause, upon proper motion and for sufficient reason, may be heard out of its regular order. The motion to advance a cause must contain a statement of the nature of the action and the reasons for advancement, and the same will be considered without argument.

No. 16. Trial Dockets for Attorneys. On the 1st of each month the clerk shall send to the attorneys of record a printed copy of the trial docket for the second month following, showing the day on which each cause will be heard. He shall notify them of all orders of the court in each cause.

No. 17. Continuance. A continuance in a civil cause, unless for good reason shown, will carry it to the heel of the docket. A continuance in a criminal appeal will carry it to such time as the court may order.

No. 18. Submission on Briefs. Attorneys wishing to submit their causes on briefs and abstracts may avoid the inconvenience of personal attendance at court by filing a written order with the clerk so to submit. In all such cases, their briefs and abstracts, with proof of service, must be on file.

No. 19. Arguments—Time Allowed. Thirty minutes only, except with the consent of the court, shall be consumed in the oral argument of a cause by counsel for either party. Oral argument on motions will be limited to fifteen minutes on each side.

REHEARINGS.

No. 20. Petitions. An application for a rehearing shall be made by petition signed by counsel, particularly setting forth the grounds thereof, which must be filed within twenty days from the date of the decision. No argument or brief will be allowed on the petition, except such as may be incorporated therein, but if the application be granted the case will be assigned for rehearing and such time given for argument or brief as the court may allow.

FEEs AND COSTS.

No. 21. Executions. Execution on a judgment for costs having been returned unsatisfied, the clerk shall notify the sureties for costs, or their executors or administrators, of such return, and that, unless said costs shall be paid within ten days after receipt of said notice, a motion will be made for a judgment against them. If good cause shall not be shown why the same ought not to be done, judgment will be entered against the sureties, or their executors or administrators, for the amount remaining unpaid for which the plaintiff in error may be liable; and execution may be issued on such judgment as in other cases.

No. 22. Witnesses. In all original actions in this court, no fees or costs will be allowed or taxed for the mileage of any witness for any distance outside the county where the court is held, unless the subpoena under which the witness attends has been issued upon the special order of the court or a justice thereof.

WITHDRAWAL OF RECORDS.

No. 23. Cases Pending. The record may be temporarily withdrawn by an attorney interested in the case for the purpose of enabling him to prepare his brief and abstract; and in all such cases the attorney receiving such record shall receipt for the same, and return it to the clerk within twenty days from its receipt, such attorney paying all charges of transmitting and returning such record. In no case shall the clerk allow an original opinion to be taken from his office except by the reporter, who shall return it as soon as possible.

No. 24. Cases Decided. Where original records of decided cases or copies thereof are temporarily loaned to attorneys, the same shall be returned to the clerk's office within twenty days from the date of their receipt, and the person to whom they are loaned shall pay all expenses of transmitting and returning such records or copies.

ADMISSION OF ATTORNEYS.

No. 25. Motion — Non-residents — Fee. Any resident of Kansas who was admitted to practice in the district and inferior

courts of this state prior to June 1, 1903, will be admitted to practice in this court, on motion, and any practicing attorney of any state or territory having professional business in this court may be admitted for the time and purpose of such business, upon taking the oath hereinafter set out. All motions for the admission of attorneys must be presented at the morning hour, immediately after the first call of the docket. Each resident attorney, upon being admitted under this rule, shall pay three dollars to the clerk, who shall furnish him a certificate of admission and a printed copy of the rules.

No. 26. Petition—Contents. In all cases other than those provided for in Rule 25, applications for admission to the bar shall be made by petition to this court. The petition shall be in the handwriting of the applicant, shall be verified by his affidavit, and shall state his full name, residence, and place and date of birth, and, if foreign born, the facts showing that he is a citizen of the United States, and the place of his residence and his occupation during the five years immediately preceding the application. If he has been admitted to practice in any other state or territory, his petition shall also state the time and place of such admission, the place or places where he has been engaged in practice, the time of practice in each place, and whether any proceedings have ever begun for his disbarment, and, if so, when, where, and with what result. If he is a graduate of a law school, his petition shall state the name and location of the school and the date of his graduation. If he has not been admitted to practice in the highest court of any other state or territory, and is not a graduate of a law school, his petition shall state his general educational advantages exclusive of legal study, and where and for what time, with whom, or in what law school or under what supervision his legal studies have been pursued, and the works read in the course of such legal study.

No. 27. Board of Examiners—Time, Place and Nature of the Examinations. Upon any such petition's being filed with the clerk of this court, he shall post the name and address of the applicant in a conspicuous place in his office for a period of thirty days, after which the petition shall be referred to five attorneys to be appointed by this court to investigate and report upon all such applications, who shall constitute, and be known as, "The State Board of Law Examiners." Appointments of members of such board will be in writing and will specify the duration of the term of each appointee. The board shall meet at Topeka on the third Mondays of January and June in each year for the examination into the qualifications of applicants, and for other purposes connected therewith at such times as it may determine. Three members of the board shall constitute a quorum. Examinations relative to the learning of such applicants shall be oral or in writing, or partly oral and partly in writing, in the discretion of the board. They shall be held in the court-room of this court, unless otherwise provided, and shall be open to the public. They shall include an inquiry into the general learning of each applicant, as well as into his learning in the law, and the applicant shall be required to show educational attainments substantially equivalent to the results of completing an ordinary high-school course of study. The general character of such examinations and the standard required for a favorable report shall be as nearly uniform as practicable. Investigation into the other qualifications of applicants shall be conducted in such manner and be determined upon such proof as the board

may require. As soon as practicable after the completion of an examination the board shall file a report with the clerk of the court recommending the granting or the denial of the petition of the applicant. Whenever such report shall recommend the granting of the petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows: You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the state of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to, any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of, any falsehood in court; and that you will discharge your duties as an attorney and counselor of the supreme and all inferior courts of the state of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God. Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, and shall enter his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect. It shall be the duty of every member of the bar of this court to aid the court and the board of examiners in the investigation concerning the character and qualifications of all applicants for admission to practice, and to communicate to the board any information known to him affecting such matters.

No. 28. Organization of Board—Remuneration—Costs of Proceeding. At each January meeting of the board of examiners a chairman and a secretary shall be elected. Subject to the approval of the court, the board may make rules for the conduct of examination, which, upon such approval, shall be published as a part of the rules of the court. The members of said board of examiners shall each be allowed as compensation ten dollars for every day actually and necessarily employed in the performance of the duties herein specified and, in addition thereto, such sums as they shall actually and necessarily expend in connection therewith, including their personal expenses in going to, attending upon, and returning from, the meetings. Such amounts shall be taxed as costs in the proceedings instituted by the filing of such petitions for admission to the bar. To provide for the payment of these and the other costs of such proceedings each applicant shall deposit with the clerk at the time of filing his petition the sum of twenty-five dollars. From this fund the clerk shall pay to the members of said board the amounts herein provided. In case of the fund's being at any time insufficient for the payment of the full amount of costs so taxed, part payments shall be made to the members of the board, proportioned to the amounts due them respectively. When the petition of any applicant shall be withdrawn or denied the amount paid by him shall be returned. He shall be allowed to file a subsequent application only upon the written consent of at least three members of the board.

STATE BOARD OF LAW EXAMINERS.

JAMES D. MCFARLAND, *Chairman*, Topeka.
LUCIUS H. PERKINS, *Secretary*, Lawrence.
GEORGE H. BUCKMAN, Winfield.
C. FRED HUTCHINGS, Kansas City.
GEORGE A. VANDEVEER,* Hutchinson.

RULES.

Adopted by the State Board of Law Examiners.

RULE I. Conditions Precedent. No applicant will be accepted for examination in the law until he has satisfied the board (a) that he is a person of good moral character; (b) that he is possessed of the requisite general education.

RULE II. Certificate of Character. Every applicant for examination for admission to the bar will be required to produce and file with the secretary of the board a written certificate, signed by the judge of the district court or of the court of common pleas and three members of the bar of the county where he resides or has lately resided, or other evidence satisfactory to the board, showing that he is a person of good moral character.

RULE III. Proof of Education. A diploma or properly authenticated certificate showing that the applicant is a graduate of the State University or other accredited university, college or high school will be accepted as *prima facie* evidence that he possesses the requisite educational qualifications to entitle him to an examination in the law. If he has no diploma or certificate of graduation, affidavits of the applicant and his teacher or teachers or other evidence may be offered showing that he possesses the educational qualifications prescribed by the supreme court. Such affidavits, in satisfactory form, will be regarded as *prima facie* evidence that the applicant possesses the requisite educational qualifications.

RULE IV. Educational Requirements. As a guide to the requirements of the preliminary examination, this list is given of studies in which the applicant is expected to have received instruction: Three years English—grammar, rhetoric, and literature; arithmetic, algebra, geometry; general history, Roman, English and American history; civil government; the elements of physics, physical geography, botany, biology, political economy, and sociology.

*Appointed by the court, on April 10, 1907, to succeed RINALDO F. THOMPSON, whose death occurred April 4, 1907.

JUDGE THOMPSON was born in Livermore Falls, Me., August 8, 1845. He came to Kansas in 1872 from Appleton City, Mo., shortly after his admission to the bar, and located at Minneapolis. He was elected to represent Ottawa county in the state legislature in 1873, and in 1874 was chosen county attorney of that county, which office he held for a number of years. He served as judge of the thirtieth judicial district from 1889 until 1908. He was appointed a member of the State Board of Law Examiners upon its organization in 1908, and continued to fill that office until his death.

RULE V. Admission to Examination. Applicants of good moral character and the requisite general education, who have complied with Rule 26 of the supreme court, and are citizens of the United States, having read law for three years in the office of a regular practicing attorney, or being graduates of the law department of the University of Kansas, or some other law school of equal requirements and reputation, will be admitted to examination in the law at such times as examinations shall be held by the board.

RULE VI. Subjects of Examination. Applicants will be required to pass a satisfactory examination as to their learning in the law upon such of the following or other subjects as the board may require: Elementary law, Roman law, personal property, constitutional law, constitutional history, international law, conflict of laws, equity jurisprudence, equity pleading and practice, contracts, evidence, real property, mortgages, negotiable instruments, agency, sales, bailments, partnership, corporations, carriers, municipal corporations, torts, wills and administration, insurance, extraordinary legal remedies, provisional remedies under the Kansas statutes, domestic relations, civil procedure, criminal law, common-law pleading, federal practice, pleading and practice under the Kansas code, legal ethics.

RULE VII. Form and Time of Application. Applications for examination and proof of qualifications should be on the printed forms, and filed with the secretary of the board at least three weeks before the stated meeting of the board at which the applicant expects to present himself for examination.

RULE VIII. Method of Examination. At every examination each applicant shall draw a number on a slip of paper, on which he shall write his name and deposit it in a sealed envelope with the secretary. The number only shall be written on the outside of the envelope. When the applicant shall have finished any book he shall sign it with his number only, and mark it as directed by the board, and any other mark of identification placed upon the book shall disqualify it, and the board may refuse to read or consider it.

RULE IX. Applicants Admitted in Other States. All applicants who are otherwise qualified, and who have been admitted to practice in the highest court in another jurisdiction and have practiced there continuously for a period of three years or more, and continued to practice there or elsewhere up to the time of making application here, shall constitute a class and be examined separately, in such manner as the board may determine.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.

Alexander, Kennard v.....	30
Altamont Manufacturing Co., Hurst v.....	422
American Steel and Wire Co., Leonard v.....	79
Appleton, The State v.....	160
Arnett, Case Co. v.....	774
Arnold, Moorhead v.....	132
Atkin v. Coal Co.....	768
A. T. & S. F. Rly. Co., Bishop v.....	761
A. T. & S. F. Rly. Co., Hurd v.....	83
A. T. & S. F. Rly. Co. v. Poole.....	466
A. T. & S. F. Rly. Co., Wagner v.....	283
A. T. & S. F. Rly. Co. v. Weikal.....	763
Avery v. Railroad Co.....	563

B.

Baden, Croan v.....	364
Baldwin v. Baldwin.....	39
Bank, Cox v.....	789
Bank, Crane v.....	287
Bank, Shattuck v.....	793
Bank, Sweet v.....	47
Bankers' Union of the World, Scott v.....	575
Barber County, Wisner v.....	324
Barnett v. Schad.....	414
Bartlett, Christisen v.....	401
Barton County v. The State.....	69
Bathey, Martindale v.....	92
Beachy v. Shomber.....	62
Behrens, O'Keefe v.....	469
Belknap Savings Bank, Shattuck v.....	793
Benefit Association v. Wood.....	124
Bennett v. Cummings.....	647
Betterment Co. v. Reeves.....	107
Bigger, Young v.....	146
Billings v. Railroad Co.....	757
Bishop v. Railway Co.....	761
Blomberg v. Faulkner.....	755
Board of County Comm'rs of Barber Co., Wisner v.....	324
Board of County Comm'rs of Barton Co. v. The State.....	69
Board of County Comm'rs of Decatur Co. v. Leaman.....	785
Board of County Comm'rs of Douglas Co. v. Woodward.....	238
Board of County Comm'rs of Morton Co., Whitney v.....	502
Board of Education, Cartwright v.....	32
Board of Rld. Comm'rs, Railroad Co. v.....	168
Borders v. Carroll.....	766
Bowersox v. Hall.....	99
Braden, Samp v.....	279
Brewer v. Moyer.....	756

TABLE OF CASES.

xv

Brick Co., Surety Co. v.....	196
Brickell, Railway Co. v.....	274
Briggs v. Voss.....	418
Brown, Burley v.....	780
Brown, Railroad Co. v.....	233
Brown v. The State.....	69
Bundy, Liberty v.....	794
Burial Association, The State v.....	179
Burley v. Brown.....	780
Burnette, <i>In re</i>	609

C.

Callahan, The State v.....	795
Campbell v. Faxon.....	675
Campbell, The State v.....	688
Carroll, Borders v.....	766
Cartwright v. Board of Education.....	32
Case Co. v. Arnett.....	774
Cauffman v. Lauer.....	388
Cement Co., Remsberg v.....	66
Chance, Walters v.....	680
Christisen v. Bartlett.....	401
Citizens' State Bank, Cox v.....	789
City of Coffeyville, Cartwright v.....	32
City of Kansas City, Parker-Washington Co. v.....	722
City of Kansas City, Railroad Co. v.....	571
City of Kansas City, The State v.....	795
City of Liberty v. Bundy and Hill.....	794
City of Ottawa v. Johnson.....	165
Clogston v. Smith.....	174
Coal Co., Atkin v.....	768
Coal Co., Duncan v.....	432
Coffeyville, Cartwright v.....	32
Coffeyville Gas Co. v. Dooley.....	758
Comeaux, West v.....	271
Commission Co. v. Cummings.....	647
Comm'rs of Barber Co., Wisner v.....	324
Comm'rs of Barton Co. v. The State.....	69
Comm'rs of Decatur Co. v. Leaman.....	785
Comm'rs of Douglas Co. v. Woodward.....	238
Comm'rs of Gove Co., Smith v.....	506
Comm'rs of Morton Co., Whitney v.....	502
Cook, Volle v.....	793
Cox v. Bank.....	789
Crane v. Bank.....	287
Croan v. Baden.....	364
C. R. I. & P. Rly. Co. v. Wynkoop.....	590
Crystal Case Co. v. Arnett.....	774
Cue v. Johnson.....	558
Cullison v. Cullison.....	281
Cummings, Bennett v.....	647

D.

Davidson, Hall v.....	88
Daughters of Justice v. Swift.....	255
Decatur County v. Leaman.....	785
Deming Investment Co. v. Wallace.....	291
Dennis, McCready v.....	778

Dethampl v. Irrigation Co.....	54
Dewey, The State v.....	735
Dineen v. Olson.....	379
Disney v. Healey.....	326
Dooley, Gas Co. v.....	758
Dorr, Railway Co. v.....	486
Douglas County v. Woodward.....	238
Duncan v. Huse.....	432
Dunlap, Reynolds v.....	759

E.

Eastham, Ross v.....	464
Edwards v. Sourbeer.....	224, 794
Ehrsam & Sons Manufacturing Co. v. Jackman.....	435
Electric Railroad Co. v. Railroad Commissioners.....	168
Electric Railway, Light and Ice Co. v. Brickell.....	274
Elliott, <i>In re</i>	151
Enright, Gille v.....	245

F.

Fair, Smyser v.....	773
Fairchild, Kruse v.....	308
Faulkner, Blomberg v.....	755
Faxon, Campbell v.....	675
Federal Betterment Co. v. Reeves.....	107
Fields, Railway Co. v.....	375
Fithian, Railway Co. v.....	784
Fletchall, Morrill Township v.....	787
Foran v. Healy.....	633
Fosha, Underwood v.....	408
Fowler v. Wood.....	511

G.

Garner v. Insurance Co.....	127
Gas Co. v. Dooley.....	758
Gas Co. v. Eastham.....	464
Geiser, Hatch v.....	81
Gibson, Harris v.....	765
Gibson v. Johnson.....	261
Gibson v. Trisler.....	397
Gille v. Enright.....	245
Gleason, Phares v.....	604
Goodlander, Haines v.....	183
Goodyear v. Williams.....	192
Goss, Voss v.....	120
Gove County, Smith v.....	506
Grand Lodge v. Troutman.....	35
Griffith v. Robertson.....	666

H.

Haines v. Goodlander.....	183
Hale, Nicholson v.....	599
Hall, Bowersox v.....	99
Hall v. Davidson.....	88
Hamlin v. Railway Co.....	565
Haney, Smith v.....	506
Hanrion v. Hanrion.....	25

TABLE OF CASES.

xvii

Harper, Page v.....	229
Harrington v. Lowe.....	1
Harris v. Gibson.....	765
Harwi Hardware Co. v. Klippert.....	783
Hatch v. Geiser.....	81
Healey, Disney v.....	326
Healy, Foran v.....	633
Heilbrun, Keeler v.....	388
Hill, Liberty v.....	794
Holmes v. Waymire.....	104
Honce v. Schram.....	368
Hufford, Staley v.....	686
Hurd v. Railway Co.....	83
Hurdle v. Railway Co.....	769
Hurst v. Manufacturing Co.....	422
Huse, Duncan v.....	432
Hydraulic Press Brick Co., Surety Co. v.....	196

I.

Ice Co. v. Brickell.....	274
Implement Co., Railway Co. v.....	295
Independent Order of Odd Fellows v. Troutman.....	35
<i>In re</i> Burnette.....	609
<i>In re</i> Elliott.....	151
<i>In re</i> Smith.....	743
Insurance Co., Garner v.....	127
Insurance Co. v. Johnson.....	567
Investment Co. v. Wallace.....	291
Iola Portland Cement Co., Remsberg v.....	66
Irrigation Co., Dethample v.....	54

J.

Jackman, Ehrsam v.....	435
Johnson, Cue v.....	558
Johnson, Gibson v.....	261
Johnson, Insurance Co. v.....	567
Johnson, Ottawa v.....	165
Jones v. The State.....	771

K.

Kansas City, Parker-Washington Co. v.....	722
Kansas City, Railroad Co. v.....	571
Kansas City, The State v.....	795
Kansas Railway Co., Hamlin v.....	565
K. C. Ft. S. & M. Rld. Co., Limb v.....	220
K. C. Hydraulic Press Brick Co., Surety Co. v.....	196
K. C. L. Rld. Co., Billings v.....	757
K. C. Outer Belt and Electric Rld. Co. v. Rld. Comm'rs.....	168
K. C. S. Rly. Co. v. Fields.....	375
Keeler v. Heilbrun.....	388
Keeler v. Lauer.....	388
Kennard v. Alexander.....	30
Klippert, Harwi v.....	783
Kruse v. Fairchild.....	308

L.

Lake Koen Navigation, Res. and Irrig. Co., Dethampl v....	54
Lauer, Cauffman v.....	388
Lauer, Keeler v.....	388
Leaman, Decatur County v.....	785
Learned, The State v.....	328
Lee, Wilkins v.....	321
Leonard v. Steel Co.....	79
Lewark v. Parkinson.....	553
Liberty v. Bundy and Hill.....	794
Life-insurance Co. v. Johnson.....	567
Light and Ice Co. v. Brickell.....	274
Limb v. Railroad Co.....	220
Lime Co., Atkin v.....	768
Liquidation Co., Robertson v.....	779
Logan, The State v.....	730
Lombard Liquidation Co., Robertson v.....	779
Long v. Thompson.....	76
Lorentz, The State v.....	794
Lowe, Harrington v.....	1

M.

Manufacturing Co., Hurst v.....	422
Manufacturing Co. v. Jackman.....	435
Mathis v. Strunk.....	595
Martindale v. Battey.....	92
McBride, The State v.....	735
McCready v. Dennis.....	778
McLaughlin, Railway Co. v.....	248
Mechanics' Insurance Co., Garner v.....	127
Milwaukee Mechanics' Insurance Co., Garner v.....	127
M. K. & T. Rly. Co. v. Fithian	784
M. K. & T. Rly. Co. v. McLaughlin	248
M. K. & T. Rly. Co. v. Pratt	210
M. K. & T. Rly. Co. v. Taylor	482
M. K. & T. Rly. Co. v. Wade	359
Montpelier Savings Bank and Trust Co., Sweet v.....	47
Moorhead v. Arnld.....	132
Morgan, Stark v.....	453
Morrill Township v. Fletchall.....	787
Morrison, Railroad Co. v.....	265
Morton County, Whitney v.....	502
Moyer, Brewer v.....	756
M. P. Rly. Co. v. Dorr	436
M. P. Rly. Co., Hurdle v.....	769
M. P. Rly. Co. v. Implement Co.....	295
Mutual Burial Association, The State v.....	179

N.

National Surety Co. v. Brick Co.....	196
Navigation, Reservoir and Irrigation Co., Dethampl v.....	54
New v. Smith.....	174
Nicholson v. Hale.....	599

TABLE OF CASES.

xix

O.

Odd Fellows v. Troutman.....	85
Oil and Gas Co. v. Eastham.....	464
O'Keefe v. Behrens.....	469
Olson, Dineen v.....	379
Ottawa v. Johnson.....	165
Outer Belt and Electric Rld. Co. v. Rld. Comm'rs.....	168

P.

Page v. Harper.....	229
Parker-Washington Co. v. Kansas City.....	722
Parkinson, Lewark v.....	558
Pepper, Spaulding v.....	644
Peru-Van Zandt Implement Co., Railway Co. v.....	295
Phares v. Gleason.....	604
Place v. Thompson.....	76
Poole, Railway Co. v.....	466
Portland Cement Co., Remsberg v.....	66
Pratt, Railway Co. v.....	210
Press Brick Co., Surety Co. v.....	196

R.

Railroad Commissioners, Railroad Co. v.....	168
Railroad Co., Avery v.....	563
Railroad Co., Billings v.....	757
Railroad Co. v. Brown.....	238
Railroad Co. v. Kansas City.....	571
Railroad Co. v. Morrison.....	265
Railroad Co., Limb v.....	220
Railroad Co. v. Railroad Commissioners.....	168
Railway Co., Bishop v.....	761
Railway Co. v. Dorr.....	486
Railway Co. v. Fields.....	375
Railway Co. v. Fithian.....	784
Railway Co., Hamlin v.....	565
Railway Co., Hurd v.....	83
Railway Co., Hurdle v.....	769
Railway Co. v. Implement Co.....	295
Railway Co. v. McLaughlin.....	248
Railway Co. v. Poole.....	466
Railway Co. v. Pratt.....	210
Railway Co. v. Taylor.....	482
Railway Co. v. Wade.....	359
Railway Co., Wagner v.....	283
Railway Co. v. Weikal.....	763
Railway Co. v. Wynkoop.....	590
Railway, Light and Ice Co. v. Brickell.....	274
Reeves, Betterment Co. v.....	107
Remsberg v. Cement Co.....	66
Reneer, Zibold v.....	312
Renville State Bank, Crane v.....	287
Reservoir and Irrigation Co., Dethample v.....	54
Reynolds v. Dunlap.....	759
Rickzecker, The State v.....	495
Robertson, Griffith v.....	666
Robertson v. Lombard.....	779
Ross Oil and Gas Co. v. Eastham.....	464
Root v. Wolff.....	777

Roupetz, The State v.....	663
Rowland, The State v.....	790

S.

Samp v. Braden.....	279
Samson v. Zimmerman.....	654
Savings Bank, Shattuck v.....	793
Savings Bank, Sweet v.....	47
Schad, Barnett v.....	414
Schram, Honce v.....	368
Scott v. Bankers' Union.....	575
Shattuck v. Bank.....	793
Shomber, Beachy v.....	62
Sklenar, Sramek v.....	450
Smith v. Haney.....	506
Smith, <i>In re</i>	743
Smith, New v.....	174
Smith v. White.....	607
Smyser v. Fair.....	773
Sons and Daughters of Justice v. Swift.....	255
Sourbeer, Edwards v.....	224, 794
Spaulding v. Pepper.....	644
Sramek v. Sklenar.....	450
Staley v. Hufford.....	686
Stark v. Morgan.....	453
State v. Appleton.....	160
State v. Callahan.....	795
State v. Campbell.....	688
State v. Dewey.....	735
State v. Learned.....	328
State v. Logan.....	730
State v. Lorentz.....	794
State v. McBride.....	735
State v. Ricksecker.....	495
State v. Roupetz.....	663
State v. Rowland.....	790
State v. Wilson.....	334
State v. Wilson.....	735
State v. Sweizewski.....	733
State, <i>ex rel.</i> , Brown v.....	69
State, <i>ex rel.</i> , v. Burial Association.....	179
State, <i>ex rel.</i> , v. Kansas City.....	795
State, <i>ex rel.</i> , v. Tibbits.....	493
State, <i>ex rel.</i> , v. Welfelt.....	791
State, Jones v.....	771
State Bank, Cox v.....	789
State Bank, Crane v.....	287
State Life-insurance Co. v. Johnson.....	567
Steel and Wire Co., Leonard v.....	79
St. L. & S. F. Rld. Co. v. Morrison.....	265
Strunk, Mathis v.....	595
Sweet v. Savings Bank.....	47
Sweizewski, The State v.....	733
Swift, Daughters of Justice v.....	255
Surety Co. v. Brick Co.....	196

TABLE OF CASES.

xxi

T.

Taylor, Railway Co. v.....	482
Thompson, Long v.....	76
Tibbits, The State v.....	493
Triple Tie Benefit Association v. Wood.....	124
Trisler, Gibson v.....	397
Troutman, Grand Lodge v.....	35
Township of Morrill v. Fletchall.....	787
Trust Co., Sweet v.....	47

U.

Underwood v. Fosha	408
U. P. Rld. Co., Avery v.....	563
U. P. Rld. Co. v. Brown	233
U. P. Rld. Co. v. Kansas City	571

V.

Volle v. Cook.....	793
Voss, Briggs v.....	418
Voss v. Goss.....	120

W.

Wade, Railway Co. v.....	359
Wagner v. Railway Co.....	283
Wallace, Deming v.....	291
Walters v. Chance.....	680
Waymire, Holmes v.....	104
Weikal, Railway Co. v.....	763
Welfelt, The State v.....	791
West v. Comeaux.....	271
White, Smith v.....	607
Whitney v. Morton County.....	502
Wichita Mutual Burial Association, The State v.....	179
Wilkins v. Lee.....	321
Williams, Goodyear v.....	192
Wilson, The State v.....	334
Wilson, The State v.....	735
Wire Co., Leonard v.....	79
Wisner v. Barber County.....	324
Wolff, Root v.....	777
Wood, Benefit Association v.....	124
Wood, Fowler v.....	511
Woodward, Douglas County v.....	238
Wyandotte Coal and Lime Co., Atkin v.....	768
Wynkoop, Railway Co. v.....	590

Y.

Young v. Bigger.....	146
----------------------	-----

Z.

Zibold v. Reneer.....	312
Zimmerman, Samson v.....	654

CASES OVERRULED.

- Ashmore v. McDonnell, 16 Pac. 687 (not reported).
See Gray v. Stewart, 70 Kan. 429.
- A. T. & S. F. Rld. Co. v. Hague, 54 Kan. 284.
See Railway Co. v. Durand, 65 Kan. 384.
- Bank v. Hardman, 62 Kan. 242.
See Securities Co. v. Manwarren, 64 Kan. 636.
- Bedell v. National Bank, 16 Kan. 180.
See Stettauer v. Carney & Stevens, 20 Kan. 497.
- Beverly v. Barnitz, 55 Kan. 451.
See Beverly v. Barnitz, 55 Kan. 466.*
- Brewster v. Madden, 15 Kan. 249.
See Stark v. Morgan, 73 Kan. 453.
- Briggs v. C. K. & W. Rld. Co., 56 Kan. 526.
See Railroad Co. v. Nyce, 61 Kan. 394.
- Broquet v. Warner, 43 Kan. 48.
See Warner v. Broquet, 54 Kan. 649.
- Campbell v. The State, 3 Kan. 488.
See Shellabarger v. Nafus, 15 Kan. 554.
- Gannon v. Stevens, 13 Kan. 447.
See Shellabarger v. Nafus, 15 Kan. 554.
- Hale v. Rawallie, 8 Kan. 136.
See Shellabarger v. Nafus, 15 Kan. 554.
- Hopkins, *Warden*, v. K. P. Rly. Co., 18 Kan. 462.
See Cent. Branch Rld. Co. v. Lea, 20 Kan. 365.
- Lawrence v. Leidigh, 58 Kan. 594.
See Cory v. Spencer, 67 Kan. 648.
- Leavenson *et al.* v. Lafontaine, 3 Kan. 523.
See Turner v. Crawford, 14 Kan. 504.
- Markin v. Priddy, 39 Kan. 462.
See Markin v. Priddy, 40 Kan. 689.
- Mellison v. Allen, 30 Kan. 382 (in part).
See Stark v. Morgan, 73 Kan. 453.
- O'Meara v. McDaniel, 49 Kan. 685 (in part).
See Bolinger v. Brake, 57 Kan. 668.
- Rahm v. Bridge Manufactory, 16 Kan. 277.
See Rahm v. Bridge Manufactory, 16 Kan. 581.
- Railway Co. v. Merrill, 61 Kan. 671 (in part).
See Railway Co. v. Merrill, 65 Kan. 436.

Russell v. The State, 11 Kan. 322.
See **Shellabarger v. Nafus**, 15 Kan. 554.

Sherman v. Luckhardt, 65 Kan. 610.
See **Sherman v. Luckhardt**, 67 Kan. 682.

Sims v. Daniels, 57 Kan. 552.
See **Miller v. Clark**, 62 Kan. 279.

Simmons v. Garrett, McCahon, 82.
See **Burchfield v. Haffey**, 34 Kan. 43.

State v. Horne, 9 Kan. 131.
See **Shellabarger v. Nafus**, 15 Kan. 554.

State v. Reisner, 20 Kan. 548.
See **State v. McGillvray**, 21 Kan. 680.

Stewart v. Price, 64 Kan. 191.
See **Manley v. Park**, 68 Kan. 400.

Stigers v. Stigers, 5 Kan. 652.
See **Finley v. Funk**, 35 Kan. 673.

Watkins v. Glenn, 55 Kan. 417.
See **Beverly v. Barnitz**, 55 Kan. 466.*

W. & W. Rld. Co. v. Kuhn, 38 Kan. 104.
See **W. & W. Rld. Co. v. Kuhn**, 38 Kan. 675.

* Reversed by the supreme court of the United States.

See *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93.

NOTE.

THIS volume begins with the February session, 1906, and includes the record of all cases decided prior to the June session, 1906, and not heretofore reported. It contains 126 opinions, delivered by the justices as follow: JOHNSTON, C. J., 16; GREENE, J., 13; BURCH, J., 15; MASON, J., 23; SMITH, J., 17; PORTER, J., 20; GRAVES, J., 22. Opinions *per curiam* were delivered in 32 cases, all of which are reported (pp. 755-795). Chief Justice JOHNSTON rendered two dissenting opinions (pp. 60, 480). Mr. Justice BURCH rendered one dissenting opinion (p. 103), and dissented in another case (p. 60). Mr. Justice SMITH dissented in one case (p. 103). Mr. Justice PORTER rendered one dissenting opinion (p. 119).

SUPREME COURT, STATE OF KANSAS.

JANUARY TERM, 1906.

PRESENT:

HON. WILLIAM A. JOHNSTON, CHIEF JUSTICE.	
HON. ADRIAN L. GREENE,	}
HON. ROUSSEAU A. BURCH,	
HON. HENRY F. MASON,	
HON. CLARK A. SMITH,	
HON. SILAS W. PORTER,	
HON. CHARLES B. GRAVES,	JUSTICES.

M. J. HARRINGTON V. E. J. LOWE *et al.*

No. 14,483. (84 Pac. 570.)

SYLLABUS BY THE COURT.

CONTRACTS—*Married Women—Validity.* In Kansas coverture affords no ground for declaring invalid a married woman's contract, even although she possesses no separate estate or separate trade or business.

Error from Phillips district court; ABEL C. T. GEIGER, judge. Opinion filed February 10, 1906. Reversed.

STATEMENT.

THE plaintiff in error commenced the suit from which this proceeding in error arises for the purpose of foreclosing a real-estate mortgage executed by James and Malinda Suggs. B. A. Mason answered that he was the owner of the mortgaged premises, and traced his title from James and Malinda Suggs through their deed to the First National Bank of Orleans, Nebraska,

1-73 KAN.

73 1
74 37
74 44

73 1
79 398

Harrington v. Lowe.

the deed of a receiver for that institution to W. A. Green, and the deed of the latter to him. C. E. Nelson answered claiming that C. V. Rand was the owner of the land, and asked for the foreclosure of a mortgage given by Rand to one E. J. Lowe, and by the latter transferred to him. E. J. Lowe answered that, having obtained title by means of quitclaim deeds from the heirs of James Suggs, who was then deceased, and by means of a conveyance from the holder of a tax deed to the land, she had conveyed it to C. V. Rand. C. V. Rand answered admitting the conveyance to him, but, being doubtful in respect to the soundness of his title, and its freedom from encumbrances, he asked for relief against the Nelson mortgage, and against Lowe as his warrantor, in the event that a right superior to his should be established. The Selbys claimed a fractional interest in the land as heirs of James Suggs, deceased. The statute of limitations was pleaded as a bar to any kind of relief upon the plaintiff's mortgage.

The case was submitted upon an agreed statement of facts, which reads as follows:

"(1) It is stipulated between the parties hereto, for the purpose of this hearing, that the following are the facts in the case:

"(2) That James Suggs received a patent to the land in controversy from the United States, dated March 25, 1886, and on the same day the said James Suggs, together with Malinda Suggs, his wife, then residents of Phillips county, Kansas, borrowed of one Edward E. Parker the sum of \$500, which sum they agreed to repay on the 1st day of March, 1891, all of which was evidenced by a note of that date, which is hereto attached and marked 'Exhibit A,' and that on the same day and as a part of the same transaction, and for the better securing of said note and interest as the same matured, the said James Suggs and Malinda Suggs executed to the said Edward E. Parker their certain mortgage deed conveying to the said Edward E. Parker the land in controversy, which mortgage is attached, marked 'Exhibit B,' and that said mortgage was duly filed for record on the 27th day of March, 1886.

Harrington v. Lowe.

"(3) That on the 1st day of January, 1886, the First National Bank of Orleans, Nebraska, was a going concern, duly organized under the national banking act, and continued to be a going concern until the 1st day of May, 1897, upon which date it became and was insolvent, and was so declared by the comptroller of the currency, and one P. O. Hedlund was duly appointed receiver thereof, and that thereafter and upon the resignation of said P. O. Hedlund one John W. McDonald was duly appointed receiver and continued to act as such until the affairs of said bank were wound up, which date was about the 1st day of January, 1903; that from the 1st day of January, 1886, up to the 1st day of May, 1897, and during all the time said bank was a going concern, George W. Burton was the president thereof; that on the 30th day of November, 1888, James Suggs and Malinda Suggs, his wife, executed a deed to the premises in controversy, in which the name of the grantee was blank, and delivered the same to George W. Burton, as president of said bank, such deed being a warranty with full covenants, and was made expressly subject to the mortgage hereinbefore recited; that thereafter the premises in controversy were shown in the reports of the bank as an asset thereof, and continued to be so shown until the year 1894, when the same was by order of the comptroller of the currency ordered, and was, charged off the books of said bank under the limitation imposed in the banking act itself; that during all the time said premises were listed as an asset of the bank drafts were issued by said bank and remitted by George W. Burton to the assignee of said mortgage and note, in payment of interest; that after said assets were charged off the books of said bank said George W. Burton remitted, on March 25, 1895, the interest due on March 1 of that year. On October 10, 1895, he remitted the interest due on September 1, 1895. On April 5, 1896, he remitted the interest due up to March 1, 1897.

"(4) That on or about the 22d day of May, 1889, the said James Suggs departed this life, leaving surviving him his widow, Malinda Suggs, and the following children and heirs at law, to wit: Eliza Suggs, Katie Suggs, Sarah E. Thompson, Sarah M. Selby, and Mary Selby, daughters, and Alexander Corbett and Sarah E. Corbett, children of a deceased daughter

Harrington v. Lowe.

and grandchildren of the said James Suggs. The said Alexander Corbett was also known as Harry Corbett. That on the 29th day of August, 1901, Malinda Suggs, the widow, and Eliza Suggs, single, Katie Suggs, single, Sarah E. Thompson and husband and Alexander Harry Corbett and Sarah E. Corbett conveyed to E. J. Lowe, by quitclaim deed, the premises in controversy, which deed was duly filed for record September 2, 1901; that on the 4th day of September, 1899, the county of Phillips, in the state of Kansas, acting by and through its officers, duly authorized thereunto, executed to one Eliza Rundle a tax deed to the premises in controversy, which deed was duly recorded on September 14, 1899, and on the 6th day of September, 1901, the said Eliza Rundle, single, conveyed the premises in controversy to the said E. J. Lowe, by quitclaim deed, which deed was duly recorded on September 14, 1901.

“(5) That afterward, and on the 20th of September, 1901, the said E. J. Lowe and husband conveyed to one C. V. Rand, by warranty deed, with full covenants, the premises in controversy, which deed was duly recorded on the 23d day of September, 1901; that said C. V. Rand purchased the said premises in controversy from E. J. Lowe in reliance upon the records, and without any notice of outstanding equities further than the record disclosed, and that he paid a full consideration to the said E. J. Lowe, in good faith and in reliance upon the warranty of said E. J. Lowe, to wit, the sum of \$300 in cash and a mortgage of \$350, executed as a part of the consideration of said purchase, dated September 20, 1901, payable to the order of E. J. Lowe; that on the 21st day of November, 1901, the said C. V. Rand duly filed in the office of the register of deeds of Phillips county, Kansas, an acknowledged caveat to the effect that said \$350 mortgage was given as a part consideration of the purchase-price of said premises; that the title to the said premises was defective and that the consideration for said mortgage had in whole or in part failed, and that afterward, and on the 7th day of December, 1901, said note and mortgage were duly assigned to one John C. Bullard for a valuable consideration, as collateral security for a loan, and that he subsequently, upon payment of the debt, delivered the same to the said E. J. Lowe; that the said E. J. Lowe, on March 28, 1902, duly sold and

Harrington v. Lowe.

indorsed said note and assigned said mortgage before its maturity to the said defendant C. E. Nelson, who still owns the same, hereto attached as exhibits 'C', 'D', 'E', and 'F'; and that said Nelson was informed at the time of said purchase that such caveat was on file.

"(6) That upon the appointment of the said P. O. Hedlund as receiver of said First National Bank of Orleans, Nebraska, he found among the books, papers and assets in the vault of said bank the deed executed by the said James Suggs and wife, as hereinbefore recited, and took possession of the same, and delivered the same, with the books and papers of said bank, to his successor, John W. McDonald, and that said deed was in all respects in the same condition as when it was delivered to the said George W. Burton, as president of said First National Bank of Orleans, Nebraska.

"(7) That on the 8th day of January, 1902, John W. McDonald, as receiver of said First National Bank of Orleans, having previously applied to the circuit court of the United States for the district of Nebraska for authority to sell the premises in controversy or the interest of the bank therein, did on said date execute to one W. A. Green a deed to said premises, executed by him, the said John W. McDonald, as such receiver, in accordance with and under the direction of said circuit court, which deed was duly filed of record on the 1st day of April, 1902; that on March 28, 1902, said W. A. Green and wife executed and delivered to one B. A. Mason their quitclaim deed to the premises in controversy, which deed was duly recorded on the 1st day of April, 1902; that the deed made by James Suggs and wife, in blank, was on the 1st day of April, 1902, filed for record in the office of the register of deeds of Phillips county, Kansas, and at the time of the filing thereof it had written or printed therein as the name of the grantee, 'First National Bank of Orleans, Nebraska.'

"(8) It is further stipulated that the remittances of interest made by George W. Burton were sent and directed to one William A. Porter, Marshall, Mich., and were written upon the letter-heads of the bank of which said Burton was president, and were signed 'George W. Burton.'

"(9) That shortly after the execution of the bond the said Edward E. Parker indorsed the same as appears thereon, and for value sold and delivered it, to-

Harrington v. Lowe.

gether with the accompanying mortgage, to one Bethia L. Humphrey, and at the same time he placed the assignment on the said mortgage which appears thereon, but said assignment was unacknowledged, and was never recorded; that afterward, and on the 29th day of January, 1902, Edward E. Parker executed in writing an assignment of said mortgage to said Bethia L. Humphrey, duly acknowledging the execution of the same, which assignment was duly recorded on the 2d day of April, 1902; that on the 21st day of March, 1902, said Bethia L. Humphrey executed an assignment of said mortgage to one M. J. Harrington, which assignment was duly filed for record on the 2d day of April, 1902.

"(10) That on or about the year 1890 the said James Suggs and Malinda Suggs removed from Phillips county, Kansas, and continued at all times thereafter until the death of said James Suggs to reside in or near Orleans, in the state of Nebraska, and said Malinda Suggs thereafter continued to be a resident of the state of Nebraska.

"(11) That after said James Suggs and family removed to the state of Nebraska said premises were unoccupied until about the year 1899, when the same were taken possession of by Eliza Rundle, under her tax deed. The only possession, if any, prior thereto, after the removal of said Suggs, being the constructive possession which the law would imply from ownership under said warranty deed from Suggs and wife, delivered as aforesaid to the said George W. Burton, as president of said First National Bank of Orleans, Nebraska.

"(12) It is further stipulated that neither the said defendants Selbys, intervenors herein, defendants Lowe and wife nor Rand and wife had any notice or knowledge of the assignment of said Suggs note and mortgage until said assignments were placed of record, in April, 1902.

"(13) It is further agreed that said defendants named in the last paragraph would testify that they had no notice of the payments of instalments of interest on said note so made by said George W. Burton, president of said First National Bank of Orleans, Nebraska.

"(14) That the consideration for which said tax deed was issued to Eliza Rundle was \$71.96, at the

Harrington v. Lowe.

date of the issuance of said deed, on September 4, 1899.

"(15) That immediately upon the conveyance of the said land to the defendant C. V. Rand, as afore-said, said Rand entered into the possession thereof, and immediately, and before the commencement of this suit, made lasting and valuable improvements thereon, but the value of such improvements and the value of the rents and profits of said land are not agreed to at this time, but are reserved until the final determination of this suit.

"(16) It is further agreed that all the foregoing facts are also agreed to upon behalf of and for the intervenors, Sarah M. Selby, Lewis Selby, and Mary Selby, and the defendant C. E. Nelson.

"(17) It is further stipulated in the above case that at the time the patent issued to said James Suggs to the premises in controversy, to wit, March 25, 1886, he, the said James Suggs, took a fee-simple title to the premises in controversy; that Malinda Suggs, his wife, had at the date of the execution of said note and mortgage no separate property or estate, and that her only right of property at that time was the marital right of expectancy in the said premises owned by and patented to the said James Suggs, and covered by the note and mortgage in controversy, and that on the death of the said James Suggs, she, the said Malinda Suggs, his widow, took a fee-simple title by inheritance, under the laws of the state of Kansas, to the undivided half interest of whatever interest, if any, the said James Suggs may have had at the time of his death in the said mortgaged premises in controversy, and that at the time said note and mortgage were given the said premises were used and occupied as the homestead of James and Malinda Suggs."

The court held that suit upon the note secured by the plaintiff's mortgage was barred by the statute of limitations; that Mason's title was invalid; that the Selbys had no interest in the land; that Rand was the owner of it; and that the Nelson mortgage, which pending the hearing had been assigned to Lowe, was a valid lien and should be enforced. Judgment was rendered accordingly, and the plaintiff, Harrington, and defendant Mason prosecute error.

Harrington v. Lowe.

C. A. Lewis, and Burnham & Dashiell, for plaintiff in error, and cross-petitioner in error, *B. A. Mason*.

Flansburg & Williams, for defendant in error *Lowe*.

The opinion of the court was delivered by

BURCH, J.: If the note in suit be a valid obligation enforceable against Mrs. Suggs, her absence from the state tolls the statute, and the plaintiff's mortgage may be foreclosed. If not, his suit is barred.

It is claimed that Mrs. Suggs is not bound because she had no separate estate when the note was given, and it does not appear to be a contract made in connection with any trade or business conducted on her sole and separate account; that the so-called married women's act permits contracts only in reference to these matters, and that, except as they are removed by statute, all the common-law disabilities of married women persist. The question for determination, therefore, is the measure of capacity to enter into contracts which a married woman possesses under the laws of Kansas. The legislative act referred to took effect October 31, 1868, and reads as follows:

"SECTION 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts.

"SEC. 2. A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property and enter into any contract with reference to the same in the same manner, to the same extent and with like effect as a married man may in relation to his real and personal property.

"SEC. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"SEC. 4. Any married woman may carry on any trade or business, and perform any labor or services,

Harrington v. Lowe.

on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name." (Gen. Stat. 1901, §§ 4019-4022.)

Much stress is placed upon the words of the second section "enter into any contract with reference to the same"—that is, with reference to her real and personal property. In the case of *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480, decided at the July, 1871, term, an action had been brought on a promissory note given by a married woman. She answered that when the note was given she was a married woman; that the note was given to the payee in satisfaction of her husband's sole, separate and individual debt; and that it was given without any benefit or consideration whatever moving to her. The district court sustained a demurrer to this defense, and this court affirmed the judgment. In the facts of the case there can be found no intimation that the woman had ever possessed any property, trade, or business. There is no presumption of law that she had done so, and if such had been the case the allegations of the answer show that her contract could not have had any possible connection with them or with her services or earnings. The note concerned a matter entirely outside of the statute, and yet it was held that she had capacity to make it and that judgment might be rendered upon it.

In the case of *Wicks v. Mitchell*, 9 Kan. 80, decided at the January, 1872, term, an action was brought on a promissory note executed by a married woman with others, one of whom was her husband. She answered that the note was given in liquidation of the debt of the other makers, and that she signed as surety only. Her answer also contained the following allegations:

"That said note was not given to the plaintiff for the benefit of this defendant, nor for the use and benefit of her sole and separate property, nor with reference to the same, nor for anything which might or could

inure to its or her benefit; that this defendant did not nor has she charged her sole or separate property with the payment of said note, but at the time of its execution refused in any manner so to charge her sole and separate property, or any part thereof." (Page 81.)

A demurrer was sustained to the answer, and judgment given for the plaintiff. This answer went beyond the one made in *Deering v. Boyle*, in that it pleaded the woman's refusal to charge her separate property with the satisfaction of the contract. If the possession of a separate estate which may be bound is necessary in order to confer capacity to contract, the exclusion of such estate from benefit from the transaction and from liability for the satisfaction of the contract ought, it would seem, to be equivalent to the possession of no estate, so far as that contract is concerned. Nevertheless, it was held by this court that Mrs. Wicks had capacity to make the contract, that the answer stated no defense, and that the judgment upon it against her was authorized by law.

In the case of *Larimer v. Kelley*, 10 Kan. 298, decided at the July, 1872, term, it appeared that in 1864 Mrs. Larimer and Mrs. Kelley were captured by the Sioux Indians. They both escaped, and afterward entered into an agreement with each other to write and publish a book describing their experiences during captivity. The expenses of the work were to be borne by Mrs. Larimer, and the profits were to be divided equally. The petition of Mrs. Kelley alleged that when the manuscript was nearly completed Mrs. Larimer took possession of it, carried it to Philadelphia, and had it published in her own name, thereby depriving Mrs. Kelley of the credit and reputation of the authorship of the book and of her share of the profits of its publication. The answer alleged that at the time the agreement was made the defendant was a married woman and had no trade, business or property on her own account, had no earnings from any such trade or

business or from the performance of any labor or services, was incapable of making the contract sued upon, was not authorized to do so by her husband, and that the plaintiff was also a married woman when the contract was made, and therefore incapacitated to enter into a binding agreement. A demurrer was sustained to this answer, and judgment was rendered accordingly.

The contract pleaded was made while the married women's act of 1859 was still in force. (Comp. Laws 1862, ch. 141; Stat. of Kan. Ter. 1859, ch. 94.) Under that act, as under the act of 1868 (Gen. Stat. 1868, ch. 62) which supplanted it, the only express grant of power to make contracts was that contained in section 2, which related exclusively to property. The points of the argument made in support of Mrs. Larimer's answer are identical with those made in opposition to the liability of Mrs. Suggs, namely, disability at common law to contract at all; capacity to contract now only to the extent to which the common-law disability has been removed; the letter of the married women's act, which allows contracts only "with reference to the same"—that is, in reference to property. This court, speaking by Mr. Justice Brewer, made short work of this argument, and announced a capacity to contract which does not relate to real or personal property and which is not described in the statute. In connection with a citation of the statute he said:

"The third and fourth defenses are that a *feme covert* cannot make a contract such as is set forth in the petition. That contract is one for labor. Each is to furnish her skill and knowledge, her time and labor, in the production of a book. . . . If she can perform labor and services on her separate account, she can contract for them. If she performs them, she can recover for them. The coverture of the parties did not therefore avoid their contract, and the demurrer to the third and fourth defenses was properly sustained." (*Larimer v. Kelley*, 10 Kan. 298, 304.)

In the case of *Tallman v. Jones*, 13 Kan. 438, de-

cided in 1874, a strict and literal interpretation of the statute was rejected, and it was held that a married woman without any separate estate might purchase property on credit for the purpose of engaging in business, and that her note given for such property was a valid obligation.

In the case of *Miner v. Pearson*, 16 Kan. 27, suit was brought to recover upon the note of Louisa B. Pearson and Walter C. Pearson, and to foreclose a mortgage securing it. The district court refused to render a judgment against Louisa B. Pearson on the ground, as counsel stated, that she was a *feme covert*. There is nothing in the case to show that she owned the land or had any separate estate when the note and mortgage were given, or that they were given with reference to any trade or business. This court ordered judgment against her, saying:

"A married woman may in this state bind herself by her contracts to the extent of her separate property. And a personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws." (Page 28.)

In the case of *Bolinger v. Brake*, 4 Kan. App. 180, 45 Pac. 950, a married woman had joined in the covenants of a warranty deed of her husband's land. Her capacity to bind herself by such a contract was denied, but both the trial court and the court of appeals held her liable, and the judgment was affirmed by this court. (57 Kan. 663, 47 Pac. 537; 58 Kan. 818, 51 Pac. 290.) Other significant decisions might be adverted to.

This court has been organized some forty-four years, but counsel have cited no decision it has ever made in which any defense based on the common-law doctrine of coverture has been allowed to prevail against a married woman's contract. It is true that in *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480, and *Wicks v. Mitchell*, 9 Kan. 80, it was said that a married woman

does not bind herself personally as a man does, and that her contracts bind her separate estate or not at all. These statements, however, did not control the decisions rendered, and were soon recognized to be of no special significance. In each case capacity to make a contract which was not and could not be connected with the maker's separate property, trade, business earnings or services was recognized and the contract enforced, and in *Deering v. Boyle* the possession of a separate estate as an element of capacity was utterly ignored.

In *Deering v. Boyle* Mr. Justice Valentine undertook to show that the contract involved did relate to property in a sense sufficient to afford technical authority for it as a strictly statutory affair. He argued that a man contracts with reference to his property without mentioning it. The man makes his contract; the law says what shall be done with his property if he fail to perform. He contracts in view of the law, and thereby relates the contract to his property and binds it. Under the statute a married woman may do as a married man may do, and hence her promissory note given to pay the debt of her husband may be said to refer to her property in its obligation. A man's contract, however, does not refer merely to property in present possession or ownership. Future acquisitions are within its obligation, and the reference of a man's contract to his property may be to such future acquisitions. His contract is that if he do not pay his creditors may sue him, obtain a judgment against him, cause execution to be issued and levied on his property, and cause such property to be sold to satisfy the execution. But he need not have the smallest item or article of property, real or personal, to make the contract, or to make it refer to his property, or to support a judgment upon it. The opinion concludes:

"This is a married man's contract with reference to his property. A married woman may under said section 2 of the married women's act contract 'in the

Harrington v. Lowe.

same manner, to the same extent and with like effect,' with reference to her property." (*Deering v. Boyle*, 8 Kan. 525, 537.)

From the context it is plain that the expression used in that opinion, to the effect that unless a married woman's contract bind her separate estate it is a nullity, referred to the source of satisfaction and not to capacity to contract. The argument is this: A married woman does not bind herself personally—that is, her body cannot be taken on a *capias ad satisfaciendum*; her husband is no longer liable for her debts and he is not bound; therefore, unless she bind her own property the obligation comes to naught.

The same expression was repeated in *Wicks v. Mitchell*, 9 Kan. 80, but the context there also shows that the ineffectiveness referred to does not arise from a lack of capacity altogether prohibiting any kind of an engagement, but that it results from the want of a fund to apply to the satisfaction of a contract entered into by one at all times competent to make it.

"A party is held obligated to do that which is the legal effect of the instrument he executes. The rule is as fixed and clear for married women as for any other persons. When they sign promises to pay, the law holds that they act in good faith, and that they intend to do what they have promised. It considers that instrument a valid instrument, and as it can be held valid only because enforceable against her separate estate it enforces it against such estate." (*Wicks v. Mitchell*, 9 Kan. 80, 89.)

But the potentiality of property which, as the statute contemplates, may come to her by gift, descent, devise, or bequest, or which she may acquire through her own means, or in connection with her own trade or business, is sufficient to authorize the formation of the contractual relation.

From the foregoing it will be observed that there are no restrictions upon the authority of married women to contract generally. Whatever contract her husband can make she can make. The court availed

Harrington v. Lowe.

itself of the first opportunity presented to make this decision, and that the legislative intention was properly grasped is certain from the fact that the married women's act of 1868 has remained unchanged to this day.

The statement in *Deering v. Boyle* and *Wicks v. Mitchell* that a married woman does not bind herself personally was merely a somewhat automatic enunciation of the old law found in all the unregenerated texts. Thus, in Reeve's "The Law of Baron and Femme" it is said:

"It is a general rule that a wife cannot so contract as to bind herself; her contracts are said to be void in law. The principles on which this doctrine is founded are two: (1) The right of the husband to the person of his wife. This is a right guarded by the law with the utmost solicitude; if she could bind herself by her contracts, she would be liable to be arrested, taken in execution, and confined in a prison; and then the husband would be deprived of the company of his wife; which the law will not suffer. (2) The law considers the wife to be in the power of the husband; it would not, therefore, be reasonable that she should be bound by any contract which she makes during the coverture, as it might be the effect of coercion. On the first ground she is privileged for the sake of her husband; on the last, for her own sake." (3d ed., p. 182, *p. 98.)

"No action at law can be maintained against her. For the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern." (3d ed., p. 270, *p. 171.)

When the opinions noted were written imprisonment for debt except in cases of fraud already had been abolished, and by virtue of the very statute the court was considering the power of the husband over the wife in the matter of contracts and property had been destroyed. Therefore, as suggested in section 1045 of volume 2 of *Cord on Legal and Equitable Rights of Married Women*, the reasons assigned for the incapacity of the wife and for her exemption from personal

judgments are destitute of force under our altered and amended law. In recognition of this fact, no doubt, the tone of judicial utterance soon changed, and in *The State v. Hendricks*, 32 Kan. 559, 564, 4 Pac. 1050, the justice who wrote the opinion in *Deering v. Boyle* said:

"In Kansas, women have all the rights and privileges that men have, except merely that they cannot vote at general elections. A married woman may sue and be sued, contract and be contracted with, buy, sell, barter, trade and carry on business in the same manner, to the same extent, with like effect, and as freely as any other person may. And all this she may do in her own name, and in the same manner as others not in her condition."

For all those who feel that the reasoning of *Deering v. Boyle* is artificial, attenuated, and against the overwhelming weight of judicial opinion elsewhere, there is secure ground upon which to declare that the final conclusion reached was sound. The words *feme covert* no longer have for us anything more than a historical interest. The species is extinct in this state. This fact can best be brought into appreciation by standing for a moment with hand on mouth peering into the hole of the pit from whence we were digged.

The common law relating to the rights and powers of married women was based upon a belief in the complete union of the married pair, which would be destroyed by allowing any opportunity for a divided will. It was assumed that conjugal affection would lead the husband to deal justly with his wife, and, if that motive were not sufficiently potent, that a realization of the fact that his wife's interests were identical with his, fear of family discord, pride of appearance and other promptings would move him to eschew all arbitrariness. But it was believed that occasional lapses into despotism might better be suffered than to compromise the indivisibility and indissolubility of the matrimonial union. Hence, to the numerous and respectable audience present at his lectures Blackstone said:

"By marriage the husband and wife are one person

in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme covert*, *foemina viro cooperta*; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. (1 Black. Com., Cooley's 3d ed., 441.)

In fact, the woman acquired nothing but a right to support. She was despoiled of all her goods, chattels, and money, which the husband might dispose of as absolutely as if they had always belonged to him, and which he might will away from her at his death. He was entitled to the possession and profits of her land during the marriage, and if he survived her, and a child had been born, the right continued until his death. If she acquired property she could not hold it—it went to him. She could not make a contract or a testamentary disposition of her property, because she had no independent will of her own. The making of a contract with her husband was inconceivable. He was guardian of her children, and was entitled to her earnings and her services. Whatever she did was presumed to be under his coercion. He could restrain her person, and could visit corporal punishment upon her for the purpose of restoring that concord and harmony which marital unity required. If the baron killed his *feme* it was an ordinary kind of homicide. If the *feme* killed her baron it was a species of treason, because she rebelled against the authority and supremacy of her lord, and she was disemboweled and burnt alive.

All this followed naturally, logically and inevitably from the ideal nature of the perfect union, with headship in the husband, which the sacramental ceremony of marriage at the common law established, but it sti-

Harrington v. Lowe.

fled the free growth and expression of that individuality which the laws of nature entitle a woman to display, and it resulted in unconscionable tyranny. Misfortune frequently overtook the matrimonial venture. Wives were reduced to poverty by the conduct of vacuous and profligate husbands. Rapacious creditors knew no distinction between property produced by the impecunious but domineering husband and that which the wife had surrendered when she passed *in manum viri*, and because she was a legal and economic nonentity she was obliged to suffer and submit in abject helplessness.

Courts of equity interposed their cumbersome make-shifts of trusteeships, uses, settlements, and equitable separate estates; but equity follows the law, and unaided it could not overthrow the harsh and stern legal doctrines by which the degradation of married women was accomplished. Finally remedial legislation put in its tardy appearance. In Kansas a beginning was made with the territorial act of 1859, already cited. When the state constitution was framed it commanded the legislature to provide for the protection of the rights of married women in acquiring and possessing property—real, personal, and mixed—separate and apart from their husbands, and for their equal rights in the possession of their children, and created the homestead, which it exempts from forced sale for the payment of debts and which it prohibits the husband from encumbering or alienating without the joint consent of his wife. (Const., art. 15, §§ 6, 9; Gen. Stat. 1901, §§ 232, 235.)

These constitutional provisions themselves irretrievably broke down the common-law theory of marital unity, destroyed the notion of feminine subjection to baronial authority, threw off the restraints of coverture, and installed the modern doctrine of the equality of man and wife before the law. Legislative acts based upon the same principles speedily followed, until not only does a married woman have the right to

Harrington v. Lowe.

acquire, possess and dispose of her own property in her own way, free from her husband's dictation and domination, possess the homestead equally with him and defeat its alienation, if such be her will, make and fulfil contracts for her services, keep her own earnings, conduct her own business and retain the profits, buy from her husband and sell to him as if he were a stranger, sue and be sued, make a will, educate and control her children equally with her spouse, and govern her own conduct free from his interference or restraint, but she is authorized to attend political caucuses and conventions, nominate candidates, vote at municipal and school elections according to her own independent judgment and inclination, and to hold public offices of profit, trust, and honor. What there is left of subjugation by her husband or subjection to him to incapacitate her to make any kind of contract she please is difficult to perceive.

All the legislation affecting the status of married women must be considered in order that the full virtue of each separate act may be appreciated, and it is noteworthy indeed that on the same day the married women's act of 1868 became operative the following statute went into effect:

"The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state; but all such statutes shall be liberally construed to promote their object." (Gen. Stat. 1868, ch. 119, § 3; Gen. Stat. 1901, § 8014.)

The court, therefore, is not obliged to bend its efforts toward the preservation of the swollen autocracy of the baron over the *feme*, but it is at liberty to interpret acts of the legislature from the standpoint of the legislature itself, and according to the remedial purpose it had in view. This purpose clearly appears to involve

a recognition of the fact that the exercise of rights which formerly attended marriage by capture is no longer to be tolerated; that in the family, as elsewhere in society, the finer relations of adult individuals are not fixed by status but flow from uncoerced consent and mutual agreement; that the wants, the interests, the capacities, the activities and the aspirations of a married woman cannot be incorporated and consolidated into those of her husband so that she performs everything under his wing and cover, as Blackstone would have; that the kernel of her life is herself, which conjugal love no more obscures in her than in a man; and that she is entitled to the same untrammelled opportunity for the development and display of her womanhood that he possesses for the development and display of his manhood.

"The tendency in Kansas has always been toward an exact equality among the sexes under the law. The tendency has been to place all adult persons, male and female, upon the same legal plane so far as such a thing can be accomplished." (Mr. Justice Valentine, in *Miller v. Morrison*, 43 Kan. 446, 449, 23 Pac. 612.)

"In Kansas a woman is in nearly all matters accorded civil and political equality with man; she is not his servant nor his slave. Here, the sexes may harmonize in opinion, and cooperate in effort; here, woman is no longer subordinate to man, but the two are co-ordinate together; here, the burden of a common prejudice and a common ignorance against woman has been wholly removed; here, the tyranny which degrades and crushes the wives and mothers in other countries no longer exists; here, the coveted rewards of life forever forbidden them in some of the states are within their reach; here, a fair field for their genius and industry is open, and womanhood, with the approbation of all, may assert its divinely chartered rights, and fulfil its noblest duties." (Chief Justice Horton, in *The State v. Walker*, 36 Kan. 297, 311, 13 Pac. 279, 59 Am. Rep. 556.)

Therefore the one-person idea of the marriage relation as expounded by the common-law authorities can

no longer be made the touchstone of a married woman's rights or capacities in this state. Her powers and responsibilities do not depend upon the principle of unity, but upon the principle of diversity. True, some adumbrations of the doctrine are shown by our law, and so far as they have become fixed and settled rules must be respected. But coverture is an obsolete relation. It flourished originally in the atmosphere of caste and privilege, and it has gone the way of the *patria potestas* and chattel slavery.

"In this state a husband and wife are two independent persons; and the husband has no more immediate interest or control over the property of the wife than any other person. Our system of marriage literally implies the equality of the husband and wife; the integrity and individuality of each; the mutual obligation in which love and duty find no bondage; the division of labor; and the multiplication and sharing of happiness." (*Baker v. Stewart*, 40 Kan. 442, 459, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213.)

There is no longer any reason for the common-law doctrine relating to the contracts of married women, and with the death of the reason for it every legal doctrine dies. Reeve applies this test to the case of married women's contracts.

"The true criterion, by which we determine whether she is liable or not upon her contracts, is, whenever the aforesaid marital right [of the husband] can be affected, and whenever we can presume a possibility of coercion, her contracts are utterly void; but if we can find a case when no marital right can be affected, and every presumption of any opposite coercion is removed out of the way, the wife is bound. The words of that distinguished character, Lord Hardwicke, in 1 Ves. 305, are these: 'The disability arising from coverture is not for want of discretion, but because she is under the power of the husband; this position I take to be correct, and the consequence is clear, that when she ceases to be under his power there is no solid objection to her managing her own estate as she chooses, if no marital right is affected by it.'" (Reeve, *Bar. & Fem.*, 3d ed., p. 182, *p. 98.)

This court has had occasion to act upon the same principle:

"The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition, and are responsible for their acts. . . . But, giving this presumption its fullest scope—supposing that it has operation at common law in murder cases, as well as in many others—still we do not think it can have any operation in Kansas; and this on account of the changed condition of our society and institutions. The presumption was probably right, when first adopted, for the state of society which then existed. But it cannot be right now, under our present condition of society. And it is not the law. There was once a reason for the presumption; but that reason has long ago ceased to exist in Kansas; and when the reason for the presumption has ceased to exist the presumption itself must also cease to exist." (*The State v. Hendricks*, 32 Kan. 559, 564, 565, 4 Pac. 1050.)

"Under the provisions of our statute the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute the liability no longer exists. It is a part of the common law that, where the reason of the rule fails, the rule fails with it. . . . Again, in this state, the common-law power of correction of the wife by the husband is no longer tolerated. Under the common law the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, 'her brain and hands and tongue are her own, and she should alone be responsible for slander uttered by herself.' . . . Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this state the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts." (*Norris v.*

Corkhill, 32 Kan. 409, 410, 412, 4 Pac. 862, 49 Am. Rep. 489.)

The conclusion must be that in Kansas coverture affords no ground for declaring invalid a married woman's contract, even although she possess no separate estate or separate trade or business. This being true, the Suggs mortgage is a valid lien upon the real estate in controversy, and the plaintiff is entitled to have it foreclosed.

E. J. Lowe stands upon the proposition that Suggs and wife did not execute or deliver the instrument through which Mason claims title, and she verifies her pleading to this effect. But she alleges that if she should be mistaken the instrument is no more than a mortgage, upon which suit is barred, and hence that the receiver's deed to Green is a nullity as a conveyance of land. Besides, she denies under oath the authority of the receiver to execute and deliver that deed. She is, therefore, thoroughly committed to the position that the title to the land passed to the Suggs heirs upon the death of James Suggs, and she cannot be allowed to assume antagonistic attitudes upon the record. The Suggs heirs could not have taken a valid tax title to their own land. It was their duty to pay their taxes, and a purchase by them from the holder of a tax deed would have amounted to no more than a redemption. The same is true of their grantee, and Lowe acquired nothing by virtue of her acquisition of the Rundle tax title after she had bought out the Suggs heirs.

The district court found that the First National Bank deed was executed and delivered, and did not find that it was a mortgage. It was made subject to the plaintiff's mortgage. The copy in the record shows a consideration of \$1000. Soon after its execution and delivery Suggs and wife left the land, and the deed drew to the bank constructive possession. The bank made public claim to the land in its reports to the comptroller of the currency, paid the taxes upon it,

and paid the interest upon the plaintiff's mortgage. Finally it sold the land as its own to one not shown to have possessed any knowledge of the claimed defect, who in turn sold it to the defendant Mason. Under these circumstances James and Malinda Suggs would be estopped to deny, as against the present claimant under that deed, that it was ineffectual as a conveyance. The Suggs heirs would be estopped in the same manner, and their grantee, Lowe, possesses no right superior to theirs to dispute it.

The defendant Rand makes no claim that he acquired a good title to the land or that he was an innocent purchaser. He claims no higher right than those which Lowe possessed and could convey. Lowe cannot plead for him that he purchased innocently, for he holds Lowe's covenants that the title is good in fact.

Lowe acquired title by a quitclaim deed reciting only a nominal consideration. Inquiry at the treasurer's office—one of the public-record offices of the county—would have disclosed the fact that the bank had paid the taxes on the land for a series of years. An inquiry at the bank or of its receiver would have discovered the bank's title. Hence Lowe was not an innocent purchaser, and Rand's title obtained through her altogether fails. The purchase-money mortgage given by Rand likewise fails for want of consideration.

The judgment of the district court is reversed, and the cause is remanded, with instruction to render judgment on the findings of fact in accordance with the views expressed in the foregoing opinion.

All the Justices concurring.

Hanrion v. Hanrion.

HARRIET F. HANRION V. LOUIS B. HANRION *et al.*

No. 14,190. (84 Pac. 381.)

SYLLABUS BY THE COURT.

1. **MORTGAGES**—*Payment of Consideration by a Third Party—Resulting Trust.* A mortgage of real estate is not a conveyance within the meaning of section 6 of the statute of trusts and powers (Gen. Stat. 1901, § 7880), which provides that when a conveyance is made to one person upon a consideration paid by another no use or trust shall result in favor of the latter, but the title shall vest in the former.
2. **EXECUTORS AND ADMINISTRATORS**—*Assets of an Estate—Notes Payable to a Third Party.* Where one lends his own money upon the notes of the borrowers secured by mortgages on real estate, which notes and mortgages he retains in his own possession, they are not prevented from being treated as assets of his estate upon his death by the fact that they are made payable to a third person.

Error from Wyandotte court of common pleas; WILLIAM G. HOLT, judge. Opinion filed February 10, 1906. Affirmed. Opinion denying a rehearing filed March 10, 1906. Judgment for costs modified.

Getty, Hutchings & Dean, for plaintiff in error;
E. S. McAnany, guardian *ad litem*.

J. M. Mason, for defendants and cross-petitioner in error.

The opinion of the court was delivered by

MASON, J.: Basile Hanrion died intestate leaving a widow, Harriet F. Hanrion, and four sons. There was some disagreement among the heirs as to the proper distribution of the estate, but they all finally entered into a written contract adjusting the matter. One of the sons, however, Louis B. Hanrion, became dissatisfied and brought a suit against the widow and the other heirs to have the settlement set aside as having been wrongfully procured, and to have the property dis-

tributed according to the legal rights of the persons interested. He alleged in his petition that he was the real owner of some of the property which had been treated as assets of the estate, in virtue of its being the proceeds of trust funds placed in the hands of his father by his grandfather for investment for his benefit. He also made a claim that the estate was indebted to him upon an account for services rendered. Issues were joined and the case was tried before a referee, who found that the contract of settlement should be set aside, but that the plaintiff was not a creditor of the estate or the beneficial owner of any of the property involved, and that it should all be distributed among the heirs. The court approved the report of the referee and rendered judgment accordingly. Harriet F. Hanrion began proceedings in error, but later abandoned them. The present hearing is upon a cross-petition in error filed by the plaintiff below, Louis B. Hanrion.

Various assignments of error have been made and argued, but, except for one matter which will be specially noted, they all come under one general head—that the findings of the referee are not supported by the evidence. The record is voluminous, comprising 1370 pages. To review the evidence in detail would serve no useful purpose. Upon this branch of the case it is enough to say that the judgment could not be reversed without invading the province of the referee and reviewing his conclusions upon the credibility of the witnesses, the weight of their testimony, and the inferences to be drawn from the facts established.

The one contention of the cross-petitioner in error that involves the determination of a debatable proposition of law dissociated from any question of fact is based upon the circumstance that the property which the trial court held to be assets of the estate included a number of real-estate mortgages in which Louis B. Hanrion was named as mortgagee, although they were

Hanrion v. Hanrion.

made to secure loans made by Basile Hanrion. The argument is made that such a transaction was the conveyance to one person upon a consideration paid by another within the meaning of section 6 of the statute of trusts and powers, and therefore no use or trust resulted in favor of Basile Hanrion, but the title vested absolutely in Louis B. Hanrion. The section reads:

"When a conveyance for a valuable consideration is made to one person and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." (Gen. Stat. 1901, § 7880.)

It is obvious from the context, if not from the language quoted, that the section is intended to apply only to transactions concerning real property, and not to transfers of personalty. (*Baker v. Terrell et al.*, 8 Minn. 195.) In the case of *Robbins v. Robbins*, 89 N. Y. 251, the question whether such a statute had application to the execution of a real-estate mortgage to one person where the consideration was paid by another was involved, discussed, and decided, although the result reached was also justified upon other grounds. The view of the court upon this matter is indicated by the conclusion of the first paragraph of the syllabus:

"Held, that the provision of the statute of uses and trusts . . . declaring that where a grant is made to one person, the consideration being paid by another, no use or trust shall result in favor of the latter, but title shall vest in the former, had no application; that plaintiff, by operation of law, took the bond and mortgage as trustee for defendant, and those securities being personal property the statute had no application."

In the opinion it was said:

"Although the bond and mortgage, in form, ran to the plaintiff, he took as trustee for the defendant, by implication of law, if not by agreement. Those securities were personal property only and had no relation to the statute." (Page 258.)

An attempt is made in the brief of the cross-petitioner in error to distinguish that case from the one at bar upon the ground that our statute, although otherwise substantially the same as the one there interpreted, reads "conveyance" instead of "grant." It is manifest, however, that the words are employed interchangeably in the New York statute, for the section following the one referred to begins, "Every such conveyance," etc.

In the case of *Meier v. Bell*, 119 Wis. 482, 97 N. W. 186, cited in 2 Current Law, 1933, note 4, the supreme court of Wisconsin held that under this statute where one takes a note and mortgage in the name of another the title vests in the person named as mortgagee, but the decision is made without discussion, upon the authority of three earlier cases. Two of these relate wholly to absolute transfers of title. The third has no connection with the subject and is obviously cited by mistake, the case intended being probably the one immediately preceding it in the report, which contains an allusion to the statute but is barren of any reference to a mortgage.

It is true that the words "grant" and "conveyance" are sometimes construed to include a mortgage, even in jurisdictions where, as in Kansas, such an instrument passes no estate in the land. For various reasons that are unassailable, but which are peculiar to each of the several classes of cases, such interpretation has been adopted in the construction of statutes relating to the homestead right, to the alienation of public lands by a settler before acquiring title, to the registration of instruments affecting real estate, and to other matters. These reasons have no application here. A mortgage is but an incident to the note it secures. It inures to the benefit of the owner of the debt without formal assignment, and is incapable of assignment as a separate and independent right. It is extinguished by the payment of the indebtedness. The possession

Hanrion v. Hanrion.

of the note, as well as the designation of the payee, is evidence of its ownership, and the inapplicability of the statute is illustrated by the consideration that here the note was delivered to, and retained by, the person who made the loan. If the note had been unsecured it would hardly be contended that the beneficial title vested in Louis B. Hanrion because it was made payable to his order. The circumstance that its payment was guaranteed by the pledge of a tract of land does not alter the essential character of the transaction so as to bring it within the operation of the act in question. The judgment is affirmed.

All the Justices concurring.

PORTER, J., not sitting, having served as referee in the court below.

OPINION DENYING A PETITION FOR A REHEARING.

The opinion of the court was delivered by

MASON, J.: A part of the judgment rendered by the court of common pleas on the 1st day of February, 1904, was thus expressed: "It is further ordered and adjudged that the plaintiff, L. B. Hanrion, do have and recover of and from the defendant Harriet F. Hanrion, and Harriet F. Hanrion as administratrix of the estate of Basile Hanrion, deceased, the sum of \$615.50, with interest from March 28, 1899, at the rate of six per cent. per annum, and hereof let execution issue." In the brief of the cross-petitioner in error, Louis B. Hanrion, a criticism was incidentally offered of the form of this judgment, and in a petition for a rehearing complaint is made that this court failed to take notice of the matter. Obviously the entry should have shown a judgment in terms for the sum of the principal and interest—that is, for \$794. It does so in effect, and is good against any attack the cross-

Kennard v. Alexander.

petitioner in error has made upon it. So construed it works no injury, as under the statute the entire amount of the judgment bears interest from the date of rendition.

As the plaintiff in error instituted the proceedings in this court it is hardly just that she should be relieved from the payment of all costs here, although she afterward concluded not to prosecute the assignments of error made on her part. These costs will therefore be divided equally between her and the cross-petitioner in error. The petition for a rehearing is denied.

All the Justices concurring.

PORTER, J., not sitting, having served as referee in the court below.

EMMA F. KENNARD V. MILDRED MAY ALEXANDER.

No. 14,238. (84 Pac. 377.)

SYLLABUS BY THE COURT.

PRACTICE, SUPREME COURT—*Filing of Transcript or Case-made.*

In proceedings in error in this court the provisions of section 546 of the code of civil procedure (Gen. Stat. 1901, § 5031), reenacted in chapter 320 of the Laws of 1905, are jurisdictional and mandatory, and no degree of diligence will excuse the plaintiff in error from filing a transcript or a case-made with his petition in error.

Error from Haskell district court; WILLIAM EASTON HUTCHISON, judge. Opinion filed February 10, 1906. Dismissed.

Milton Brown, for plaintiff in error.

G. L. Miller, and *Frank Doster*, for defendant in error.

The opinion of the court was delivered by

SMITH, J.: The final judgment which it is here sought to have reviewed, according to the petition in error in this case, was rendered in the district court of Haskell county on the 13th day of October, 1903. On the 12th day of October, 1904, the last day upon which the same could have been filed within the limitation fixed by section 556 of the code of civil procedure (Gen. Stat. 1901, § 5042), the plaintiff in error filed her petition in error in this court. She did not attach thereto or file therewith any transcript or case-made whatever setting forth or purporting to set forth any of the findings of the court below, but instead thereof filed an affidavit attempting to excuse the failure to file such transcript or case-made. Such affidavit, however, fails to show any diligence whatever for the acknowledged failure to comply with the statute. Section 546 of the code of civil procedure, then and now in force, having been reenacted in chapter 320 of the Laws of 1905, provides:

"The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified or the original case-made as hereinafter provided, or a copy thereof." (Gen. Stat. 1901, § 5031; Laws 1905, ch. 320, § 1.)

We think this requirement of the statute is jurisdictional and mandatory, and that no degree of diligence will excuse the plaintiff in error from filing a transcript or case-made with the petition in error. A full year's time is given for that purpose, and ordinarily a transcript could be obtained or a case-made prepared within a few days.

Where a transcript is in fact filed with the petition in error, and there is a mistake or material omission therein, it is within the jurisdiction of this court to allow an amendment within the year at least (*L. N. & S. Rly. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733);

Cartwright v. Board of Education.

but we cannot disregard an entire failure to comply with the express requirements of the statute.

The motion of the plaintiff in error, filed April 27, 1905, to enlarge the record is denied, and the motion of the defendant in error to dismiss the case is allowed.

All the Justices concurring.

73	32
176	364

**BUD CARTWRIGHT V. THE BOARD OF EDUCATION OF
THE CITY OF COFFEYVILLE.***

No. 14,249. (84 Pac. 382.)

SYLLABUS BY THE COURT.

1. **MANDAMUS**—*Admission of a Minor to Public Schools—Parties.* A father whose minor child is living with him may maintain an action in mandamus in his own name to compel a board of education to admit his child to the public school.
2. **PUBLIC SCHOOLS**—*Separate Schools—Powers of Board of Education.* In the absence of a statute a board of education of a city of the second class has no right to establish separate public schools for white and colored children, or to exclude a colored pupil from any public school, which it is otherwise eligible to attend, for the reason *only* that such pupil is colored.

Original proceeding in mandamus. Opinion filed February 10, 1906. Peremptory writ allowed.

STATEMENT.

THIS is an original proceeding in which the plaintiff seeks a peremptory writ of mandamus to compel the defendant, the board of education of the city of Coffeyville, to admit his daughter, Eva Cartwright, to the sixth grade of the public schools of that city and to the room and class taught by the white teacher, E. E. Werner.

It appears from the agreed statement of facts and

* Pending in the supreme court of the United States on a writ of error allowed March 16, 1906.

Cartwright v. Board of Education.

the evidence that the plaintiff is a citizen of the United States and resides in the city of Coffeyville, near the school in question; that his daughter is fifteen years of age and is qualified to enter the sixth grade of such school; and that plaintiff and, of course, his child are of African descent. It also appears that the city of Coffeyville is a city of the second class, and that at the time of the acts complained of it maintained two rooms in the Lincoln school building in which the sixth grade was taught; that in one room E. E. Werner, a white man, was the teacher, and all the scholars were white, and that in the other room Jackson Dodd, a colored man, was the teacher, and all the scholars, save possibly one who went there from choice, were colored; that plaintiff and his daughter desired that she should attend the sixth-grade school taught by Werner, and that at the opening of a term of school her mother went with her and applied for the admittance of the girl to Mr. Werner's room, having presented her certificate of eligibility to that grade given to her by the superintendent of the city schools. She was told by Mr. Werner to go down to Mr. Dodd's room. Again, soon afterward, the girl went with her uncle and applied for admission to Mr. Werner's room, and again she was denied admission and told to go to Mr. Dodd's room.

The plaintiff complained to the president of the board of education and to one or two other members of that board of the refusal of Mr. Werner to receive his daughter as a pupil, and was told by the president, in substance, that the girl would have to attend where Mr. Werner had directed her or not at all.

James H. Guy, and Gaspar C. Clemens, for plaintiff.

Ziegler & Dana, for defendant.

The opinion of the court was delivered by

SMITH, J.: There was some attempt to show that the child was denied admittance to Mr. Werner's room for the reason that there was no unoccupied seat there,

while in Dodd's room there was an abundance of seats; also, that the teacher did not reject the pupil by direction of the board of education. The teacher testified that he received more white pupils soon after this girl was rejected, and we think the evidence shows that the board of education maintained separate schools for white and colored children of the same grade, and that they were separated by reason of color; that this girl was refused admission to the school where she applied for admission for really the sole reason that she was colored; and that the act of the teacher in excluding her was done in carrying out the plans of the board of education in accordance with his employment.

It is contended that the plaintiff is not the real party in interest, and hence is not entitled to maintain this action. In this state a parent is required by law to send his children of certain ages to school, and may be prosecuted criminally for his failure so to do. While several similar cases have been maintained in the name of the parent in this court, it does not appear that this question was raised therein. (*Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422, 66 L. R. A. 166, 105 Am. St. Rep. 148; *Board of Education v. Tinnon*, 26 Kan. 1; *Knox v. Board of Education*, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830.)

Authority is not wanting for this procedure. (See *The People v. The Board of Education of Detroit*, 18 Mich. 400; *State ex rel. Bowe v. Board of Education of the City of Fond du Lac*, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282.)

It is not contended that there is any statute in this state authorizing boards of education of cities of the second class to establish separate schools for the education of white and colored children. In the absence of such a statute it has been decided by this court that no such power exists, and we adhere to these decisions as expressing the law of this state. (*Board of Education v. Tinnon*, *supra*; *Knox v. Board of Education*, *supra*.)

Grand Lodge v. Troutman.

The board of education has no power to exclude colored children from schools established for white children for the reason solely that they are colored, in the absence of a statute conferring such power.

The peremptory writ of mandamus is allowed, as prayed for, with costs.

All the Justices concurring.

THE GRAND LODGE OF THE INDEPENDENT ORDER OF
ODD FELLOWS OF THE STATE OF KANSAS V. JAMES
A. TROUTMAN *et al.*

No. 14,391. (84 Pac. 567.)

SYLLABUS BY THE COURT.

1. PRACTICE, DISTRICT COURT—*Testing Sufficiency of a Pleading.* A motion to strike a pleading from the files is not an appropriate method of testing its sufficiency.
2. ——— *Petition — Amendment — Motion to Strike from the Files.* Such a motion may be used to eliminate an amended pleading which is a mere repetition of one held defective on demurrer, but where leave has been granted to amend a petition, and an amendment is made which sets forth additional facts, as well as a fuller and more explicit statement of the facts alleged in the original petition, and the amendment is apparently made in a *bona fide* effort to state a cause of action and meet the objections made to the original petition, a motion to strike the amended petition from the files because of sameness to the original petition will not lie.

Error from Osage district court; ROBERT C. HEIZER, judge. Opinion filed February 10, 1906. Reversed.

Waggener, Doster & Orr, and Pleasant & Pleasant, for plaintiff in error.

Troutman & Stone, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: The striking from the files of an amended petition is the subject of the complaint in this proceeding. The plaintiff brought a suit seeking to charge what is known as the DeBoissiere estate, which had been acquired by the defendants, with a lien for an indebtedness of DeBoissiere to one Sears which had been assumed and paid by the plaintiff. The defendants demurred to the petition on four grounds, viz.: (1) That the plaintiff did not have legal capacity to sue; (2) that there was a defect of parties defendant; (3) that several causes of action were improperly joined; (4) that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, but whether upon one or all of the grounds was not stated. The plaintiff did not stand on the ruling, but asked and obtained leave to file an amended petition. In due time an amended petition was filed, containing two counts, but the second count was dismissed by plaintiff and the first was stricken out by the court on the ground that it contained the same matters and things as the original petition, to which a demurrer had been sustained.

There is reason to complain of this ruling. A motion to strike from the files is not an appropriate test of the sufficiency of a pleading, or a proper method of ending a *bona fide* controversy. It may be used to get rid of a frivolous amendment or pleading, but the amended petition in question is hardly open to that objection. If an amended pleading were a mere repetition of the original one the court might assume that the amendment was not made in good faith and strike it from the files. The amendment in question, however, is not of that character, and does not indicate a purpose on the part of the pleader to trifle with the court. Whatever may have been the defect found in the original petition, it was one which the court determined could be reme-

Grand Lodge v. Troutman.

died by amendment, as it appears that leave was granted to amend.

Under the code great liberality is allowed in the amending of pleadings, the only express limitations being that the amendment shall not change substantially the claim or defense of the party and shall be in furtherance of justice. (Code, § 139; Gen. Stat. 1901, § 4573.) Courts may allow corrections of mistakes in the names of the parties, as well as of mistakes of every other kind, and parties may be permitted to add pertinent facts and insert allegations to make clear that which has not been definitely stated, or which will elucidate, strengthen or explain the averments of the original pleading.

Now, while many of the allegations of the original and amended petitions are substantially similar, changes of considerable consequence were in fact made. In respect to the lien sought to be charged on the property the original petition avers that it was based on an obligation of DeBoissiere to Sears, without stating its nature, or how it arose, while in the amended petition it is stated that the indebtedness was for services performed by Sears in the management of the DeBoissiere estate, and for moneys expended by him on the real estate for its betterment and improvement. How far the statement that the moneys expended by Sears were for the betterment of the real estate may have gone toward stating a cause of action cannot be determined on this motion, but it appears to be a substantial change in the pleading, and evidently one the pleader thought to be material and to have some bearing on the claim which he was making. Then in the original pleading the respective rights of DeBoissiere and Sears are said to have arisen on what is called an "arrangement," while in the amended petition it is designated as an "agreement." In the first Sears is alleged to have been in possession of the land with the consent of DeBoissiere, while in the second it is stated

that there was an agreement which provided that Sears should have the possession and management of the estate and an interest in the rents and the profits thereof in payment of his services and the moneys expended by him; that the sums due on account of the services and expenditures made should constitute a lien on the land, and, if not repaid on the death of DeBoissiere, the land should be devised to Sears in satisfaction of his claim; and that in the meantime Sears should remain in possession of the real estate for the security of the sum due him, and for the enforcement of his lien thereon.

Some general statements and conclusions of fact were thus elaborated and made more explicit, and, as is seen, some additional facts were set forth. It is true, as defendants argue, that courts will not permit the filing of pleadings which are mere repetitions of former ones held defective on demurrer. To file such pleadings would evidence such a lack of respect for judicial authority and would so interfere with the orderly administration of justice as to warrant a court in going to the extent of striking a pleading from the files; but where, as here, the amended pleading contains some additional facts, as well as fuller and more explicit statements of those set forth in the original pleading, and where the amendments are apparently made in an honest effort to state a cause of action and meet objections previously made to the original pleading, a motion to strike from the files the amended one will not lie. The question involved was not the sufficiency of the original pleading, nor the sufficiency of the amended pleading, but whether there was such a sameness in the pleadings that the latter was not entitled to be treated as an amended petition.

Our conclusion is that the order striking the amended petition from the files and dismissing the suit must be reversed, and the cause remanded for further proceedings. It is so ordered.

All the Justices concurring.

ALBERT BALDWIN V. JOHN BALDWIN.

No. 14,434. (84 Pac. 568.)

SYLLABUS BY THE COURT.

1. **CONTRACT—Parol Agreement to Convey Land—Possession as Part Performance.** In a suit to enforce a parol agreement to convey land, where possession is relied upon as part performance to take the case out of the statute of frauds, the character of the possession is of the greatest importance. It must be notorious, exclusive, continuous, and in pursuance of the contract.
2. ——— **Insufficient Instruction.** An instruction that plaintiff is entitled to recover if he has proved that he was placed in possession of the land under the contract held insufficient under the conceded facts in the case.

Error from Clay district court; SAM KIMBLE, judge.
Opinion filed February 10, 1906. Reversed.

STATEMENT.

THIS is a proceeding in error to reverse a judgment rendered against the plaintiff in error as defendant in an action for damages for the breach of a parol agreement to convey certain land, consisting of a farm in Clay county. Albert Baldwin, now past ninety-six years of age, is the father of John Baldwin, the defendant in error, and in 1893 owned an eighty-acre farm, upon which he was living with an unmarried daughter. John Baldwin, with his family, was then visiting at his father's farm, on the way to take up land in Oklahoma. He claims that his father offered, if he would move upon the place, stay there, and keep and support his father, to deed to him the land. He says that he told his father he would agree to this, provided he could purchase the adjoining 120 acres, which he did a few days thereafter, and informed his father that he had decided to accept the offer; that his father said: "All right; I will make you out a deed the first time I go to Clay Center;" that

73	30
d79	164
80	737

73	30
e82	242

with his family he at once moved upon the place, and in connection with the 120 acres he had purchased farmed it until 1896, when he built a house on his own land. He also claims that from the time he moved upon the eighty acres (in 1893) until 1901 his father continued to live with him, and that during this time he furnished the support and maintenance agreed upon.

In 1901 Albert Baldwin went upon a visit to a married daughter in Idaho, where he has ever since remained, and some time after going there conveyed the eighty acres to this daughter. The conveyance was recorded in February, 1902. The son then brought this action, claiming that he had fully performed the contract on his part, so far as it was possible for him to do so, and except as prevented by his father; that the value of the land is \$800; and that the reasonable value of the services performed under the agreement is \$800.

There were no valuable and lasting improvements placed upon the land by plaintiff, and except for some slight alterations in some wire fencing no improvements of any kind were made upon it. There were ten acres broken out in 1893, and the same when this action was brought. The son used the remainder of the land in connection with his own farm as a pasture.

Defendant filed a general denial, and also a counterclaim upon an open account for money loaned to the son at various times and supplies and property which he claims the son received from him. Among other items was one for \$300, which he testifies was pension money loaned the son, and for which he says the son agreed to execute a note, but never did so. Some of the items he says he never intended to charge against the son unless the son charged him for board. In his testimony he denies making any agreement to convey the land, and declares that the son rented a part of the eighty acres from him and gave him a share of the crops, that he always held possession of the land him-

Baldwin v. Baldwin.

self, and that portions of it were rented by him to other persons during the time plaintiff claims to have had possession. He denies that the son kept or maintained him. He testifies that during the first three years he lived with his son in his own house on this land, and furnished provisions and money for his share of the living expenses; that after the son moved to the other place he remained in his own house but took part of his meals at the son's house, and stayed there about one-fourth of the time. He also testifies that his reason for leaving and going to the daughter's home in Idaho was that his son's wife told him she could not keep him any longer, and that he would have to leave.

The jury found generally for plaintiff for \$800.

Coleman & Williams, for plaintiff in error.

F. P. Harkness, George L. Davis, and R. C. Miller, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: Defendant in error contends that by filing a general denial, and failing to plead the statute of frauds, plaintiff in error waived any defense under the statute. The petition alleged a contract to convey lands, but was silent as to whether the contract was in writing or parol. Plaintiff offered evidence of a parol contract, and the case appears to have been tried upon the theory that the statute of frauds was a defense, except as certain facts relied upon by plaintiff served to avoid the statute. It was said in *Wiswell v. Tefft et al.*, 5 Kan. 263, that the statute of frauds can be relied upon as a defense under a general denial. Without reviewing the authorities upon that question, or considering the claim of defendant in error that the statement in *Wiswell v. Tefft et al.* is *dictum*, it is sufficient to say that the objection in this case to the statute of frauds as a defense is raised for the first

time in this court, and for that reason cannot be regarded with favor.

The principles governing the case are the same as though this were a suit for specific performance of an oral agreement to convey the land. Part performance is relied upon to take the contract out of the statute. It is elementary that the acts of part performance must be such that it would be a fraud upon the party seeking the decree for the other to refuse to perform. When a party has so altered his situation upon the faith of an oral promise that a refusal to convey would result not merely in damages, not simply in the denial of what he was to receive, but also in inflicting upon him an injustice which the courts consider a constructive fraud, equity then lifts the oral contract out of the statute and compels a performance. (Browne, Stat. of Frauds, 5th ed., §§ 447, 448, 457.) It is likewise elementary that the acts of part performance relied upon must have been done in pursuance of the contract, and must be clearly, definitely and satisfactorily shown. (*Lewis v. North*, 62 Neb. 552, 87 N. W. 312, 314; *Brown v. Hoag*, 35 Minn. 373, 376, 29 N. W. 135; Browne, Stat. of Frauds, 5th ed., § 457.) It is also said that the acts of part performance are not confined to the doing of what the contract stipulates, although they must be related to, and connected with, the contract.

The acts which plaintiff claims amounted to part performance are: (1) The payment of the purchase-price, or the performance of the service contracted for, and (2) the entry into possession of the land. It is well settled that payment of the purchase-price alone is not sufficient part performance. (*Goddard v. Donaha*, 42 Kan. 754, 22 Pac. 708; *Barnes v. Boston & Maine Railroad*, 130 Mass. 388, 390; *Edwards v. Fry*, 9 Kan. 417.) The only question we need consider is whether the court erred in instructing the jury that plaintiff was entitled to recover if he proved that the

contract was entered into and the services were performed by him, so far as he was permitted to perform them, and that "under said contract he was placed in possession of the real estate."

A distinction has been made by many of the authorities between the acts which are considered sufficient part performance in case of a parol gift of land and a parol agreement to convey, which distinction is without any substantial foundation. In the one case possession without valuable and lasting improvements or some other special facts is held not sufficient; in the other, it is said possession alone is all that is required.

"A parol gift of land, even from father to son, will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some other special facts which render the failure to complete the donation peculiarly inequitable and unjust." (Pom. Cont. § 130.)

The same author says (section 133) "possession of the land is a sufficient act in case of an agreement; possession and improvements in case of a mere parol promise or gift." This distinction has been repudiated by a number of courts, for the very sound reason that in both classes of cases courts afford relief and compel specific performance upon exactly the same equitable considerations. Aside from the contract in the one case and the gift in the other, the acts of the parties must have resulted in such a change in the situation or condition of the party seeking to compel performance that it would be unjust and inequitable to deny him relief. The enforcement is not based upon the contract or the gift. In *Galbraith v. Galbraith*, 5 Kan. 402, it was said:

"So far, we have considered the case as one arising out of pure contract as between strangers, because the petition alleges a direct and positive contract, but if it be considered as a gift without consideration, the conclusion will not be changed. The fundamental principle upon which courts obtain jurisdiction remains the same. It would as much be a hardship and

fraud on the donee to be put in possession, to be induced to make large improvements for the melioration of the estate, and then for the donor to refuse to execute the gift, as it would be in the case of a purchaser. . . . It is admitted, however, that on this point the decisions have not been as uniform and harmonious as in the case of a purchase for a valuable consideration, though the general current of authorities, as well as the reasons given, apply equally as well to a gift as to a purchase. The same rule holds in the one as in the other. The possession and improvements must be under the gift and induced by it, or made in consequence of it." (Pages 410, 411.)

In the same case the court, referring to the diversity of opinion upon the sufficiency of possession alone, used the following language:

"It seems to be almost universally held that the delivery of possession and the making of valuable improvements will be such part performance as will entitle the vendee to specific execution of the contract. While there is some diversity of views as to whether the mere letting into possession alone, or possession and payment of the consideration money, in whole or in part, or some other acts, will constitute such part performance, there seems to be none where the possession is taken under the contract, in pursuance thereof, and continued, accompanied by lasting and valuable improvements of the premises." (Page 409.)

In stating the general rule in reference to the effect of part performance upon a parol gift of land the language frequently adopted by this court and others seems to ignore any distinction between parol gifts and parol agreements to convey. In *Flanigan v. Waters*, 57 Kan. 18, 45 Pac. 56, it was said:

"Equity protects and enforces a parol gift equally with a parol contract of the sale of land where possession is taken in pursuance of the gift, improvements made, and the donee changes his situation or condition upon the faith of the gift." (Syllabus.)

The language used by the supreme court of the United States in *Neale v. Neales*, 76 U. S. 1, 19 L. Ed. 590, is the same in substance, but it was said in *Ed-*

wards v. Fry, 9 Kan. 417, 423, that delivery of possession will take a case out of the statute, and the weight of authority supports this contention. If the question were a new one we should incline to hold that bare possession is not sufficient; and there is certainly no substantial reason for requiring valuable improvements in a case of a parol gift which does not apply with equal force to the case of a parol agreement to convey.

All the authorities agree, however, that when possession is relied upon as part performance it must be notorious, exclusive, and obviously in pursuance of the contract. (Browne, Stat. of Frauds, 5th ed., §§ 472-476; *Baldwin v. Squier*, 31 Kan. 283, 284, 1 Pac. 591.) It appears without contradiction that at the time the agreement is alleged to have been made in this case the old man was living on this land. The son brought his family there and moved into the house with his father, and this arrangement continued for three years. The son then built a house for himself on his adjoining land and removed there with his family. For some time afterward the old man continued to occupy his own house. The son claims that he farmed the eighty acres in connection with his own land, but the character of his possession under the conceded facts could hardly be said to have been exclusive. At least, under all the circumstances in evidence and in view of the claim of defendant that he never surrendered the possession to his son, but kept it himself and rented the land to others, the instruction with reference to the character of the possession which it was necessary for plaintiff to establish in order to recover was very meager. The jury were instructed that it was sufficient if plaintiff proved that "under said contract he was placed in possession of the real estate." It is said in Browne on the Statute of Frauds, fifth edition, section 474:

"Secondly, it must be *exclusive*. Where the purchaser moves in upon the premises and remains there

Baldwin v. Baldwin.

in company with the previous occupant, not as the ostensible and exclusive proprietor, or where the metes and bounds of the land alleged to be purchased are not fixed and recognized, and the purchaser occupies it in common with adjacent land of his own, it has been held that possession, as an act of part performance, was not sufficiently made out."

The authorities also hold that the possession must be continuous. The instruction entirely ignores this element of possession, and, literally construed, would authorize a verdict for plaintiff if possession under the contract was delivered and afterward abandoned. We think that where possession is relied upon in a case of this kind the character of the possession is of the greatest importance; it must be open, notorious, exclusive, and continuous, and, as was said in *Baldwin v. Squier*, 31 Kan. 283, 284, obviously in pursuance of the contract.

It is also held that before specific performance of a parol agreement to convey lands will be enforced the facts relied upon must be established by clear and satisfactory proof. This rule rests upon solid grounds. The evidence in this case is conflicting. The jury found upon the issues in favor of the plaintiff, and, while we cannot consider the weight of the evidence with a view of reversing or affirming their verdict, it is proper to say that the evidence relied upon to establish the contract and the performance of it is not, in our opinion, clear or satisfactory.

For the error in the instruction, therefore, the judgment is reversed, and the cause remanded for a new trial.

All the Justices concurring.

Sweet v. Savings Bank.

T. B. SWEET V. THE MONTPELIER SAVINGS BANK AND TRUST COMPANY.

No. 14,450. (84 Pac. 542.)

SYLLABUS BY THE COURT.

1. **TRUST COMPANIES—Misappropriation of Funds Collected—Liability of Managing Officers.** When the managing agents of a trust company mingle money collected for another with the current funds of the company, for use in its business, in violation of the express directions of the owner to remit, or knowingly permit their subordinates so to do, and the fund is thereby lost, such agents will be personally liable to the owner therefor, although at the time of such misappropriation it was the intent of such managing agents to account for and return the money to the owner upon demand.
2. **EVIDENCE—Admissible against One Codefendant—Failure to Limit.** Where two or more persons are defendants in the same action, and the plaintiff offers evidence competent as to one and incompetent as to another, and the latter offers an objection, which is overruled and the evidence admitted, and the court omits to limit by proper instructions the application of such evidence to the defendant against whom it properly applies, *held*, that the overruling of the objection was proper, and the omission to instruct as above stated cannot be deemed material error, when the objecting defendant does not request an instruction making such limitation.
3. — **Sufficient to Sustain the Verdict.** Evidence in this case examined and held to be sufficient to sustain the verdict.

Error from Shawnee district court; ALSTON W. DANA, judge. Opinion filed February 10, 1906. Affirmed.

Rossington & Smith, and Samuel Barnum, for plaintiff in error.

J. W. Gleed, and J. L. Hunt, for defendant in error; Gleed, Ware & Gleed, of counsel.

The opinion of the court was delivered by

GRAVES, J.: This action was brought by the defendant in error against T. B. Sweet, George M. Noble, and E. M. Sheldon, president, vice-president, and treasurer,

respectively, of the Trust Company of America, with the purpose of holding them personally responsible for the conversion of the proceeds of a collection made by the corporation of which they were the principal officers. Judgment was recovered against Sweet alone, and he brings the case here.

This case has been here before. It was reported in 69 Kan. 641, 77 Pac. 538. The law relating to the personal liability of the active managing officers of a trust company for the misappropriation and conversion of trust funds by the company was then considered by this court, and the ruling made was intended to apply specially to the facts of this case, which were practically the same then as now. The scope of that decision will be better understood by a brief reference to the facts involved.

In June, 1898, the trust company had the note and mortgage in question for collection, and on the second of that month the treasurer of the company, Shelden, wrote to the plaintiff for proper releases, as the collection was then about to be made. The letter closed with the following words: "Return it to us with all papers and we will make the collection and remit." On June 13, 1898, this request was answered by the following letter: "I enclose herewith the release asked for in the J. E. Weaver loan, and bond and mortgage, due June 1, for collection and remittance." Upon receipt of this Shelden wrote as follows: "We have yours of the 13th instant, enclosing the J. E. Weaver papers, due June 1, for collection." The collection was made, but instead of remitting the proceeds as directed the company, without giving notice that the collection had been made, credited the account of plaintiff therewith, and retained the same as a part of its own funds. In September following the assets of the trust company, including the proceeds of this collection, passed into the hands of a receiver.

It is contended that the retention of this fund by the trust company amounted to a conversion thereof,

Sweet v. Savings Bank.

for which the officers of the company are personally liable. It is claimed by the officers sought to be charged with this conversion that these two corporations had been doing business together for many years; that it had been the uniform usage in the conduct of such business, where there were no directions otherwise, for the trust company, when it made a collection, to notify the plaintiff thereof, and then reinvest or remit as might be directed; that the defendants had overlooked the foregoing correspondence concerning the remittance of this collection, and had waited for instructions; that this want of diligence and omission to obey the instructions of the plaintiff were not the result of any bad faith or wrongful intent, but a mere indifference and oversight; and that the whole transaction was the work of subordinate officers or employees in the office, of which the defendants had no actual notice.

The case when here before was reversed on account of an instruction given by the district court, which reads:

"If the defendants were, respectively, president, vice-president and treasurer of the Trust Company of America, a corporation, and the principal place of business of said company was in the city of Topeka, and the defendants had personal charge and supervision of the office and the business affairs of said company, directing and managing its affairs, receiving and disbursing moneys that came into its possession, then the defendants would be held to have knowledge of all the business affairs of the corporation which came under their personal observation and knowledge, of all the business affairs of the corporation which they might have known by the exercise of ordinary diligence in the conduct of the business affairs of the company." (69 Kan. 641, 649, 77 Pac. 538.)

The objectionable feature of this instruction is that it made the officers of the company personally liable for the misappropriation of trust funds by their company, whether they had actual knowledge thereof or

not, if by the use of ordinary diligence they might have known. This court held substantially that managing officers of a corporation cannot be held personally liable for the conversion of funds to the use of the corporation by subordinate officers, unless the transaction constituting such conversion was actually known to and acquiesced in by such managing officers. In that case Mr. Justice Atkinson used the following language in the opinion:

"But where there were sent to a corporation a note and mortgage, with instructions to collect the same and remit, and the money was collected but not remitted, a recovery may be had by the owner of the note and mortgage against the executive officers and managing agents having the active management, charge and control of its affairs for the conversion of the money by them for the use of the corporation; and a recovery may be had against them for such conversion of the money by subordinates with the knowledge and acquiescence of such officers and managing agents. . . . It is a well-known fact that much of the business of this day and age is transacted by corporations, many of them employing numerous persons in the various departments of the work in which they are engaged. Large amounts of money and property are daily handled by the employees of such corporations. The instruction complained of casts upon the executive officers and managing agents of such corporations an unreasonable degree of liability. It would be a great hardship to hold them liable for acts of misappropriation of money or property by subordinates of which they had no actual knowledge. The rule of personal liability of such officers for the misappropriation by subordinates adopted by the trial court is too far-reaching in its scope." (69 Kan. 641, 649, 77 Pac. 538.)

At the last trial of this case in the district court the plaintiff in error requested the court to give two instructions which read:

"(2) The collection of the money by the Trust Company of America was rightful, and said company was authorized to make such collection. It was the duty of said Trust Company of America to remit said money

when called for by the plaintiff, and for failure so to do it could be held liable in a proper action; but neither of the defendants is individually liable to the plaintiff for the mere failure or neglect to remit said money."

"(5) In order to render either one of the defendants liable in this action the burden of proof is upon the plaintiff to show affirmatively an actual personal knowledge of some request or direction by or from the plaintiff to remit the money in question and some actual intent to convert said money to the use and benefit of the Trust Company of America."

The court refused this request and gave the following:

"(7) Where the owner of a note and mortgage forwards the same to a person for collection, with instructions that the money collected thereon shall be remitted upon collection, then I instruct you that the money so collected, when in the hands of the person who collected it, constitutes a trust fund and belongs to the owner of the note and mortgage, and the person so collecting it is not authorized to appropriate the money to his own use."

"(13) . . . That the Trust Company of America appropriated the money so collected to the use of said company without the knowledge or consent of the plaintiff; that defendants had knowledge that the money so collected was a trust fund, and of its misappropriation; that the defendants, or either of them, participated in the misappropriation of the money, or knowingly permitted subordinates in the office to misappropriate the money to the Trust Company of America, and acquiesced in such misappropriation, then I instruct you that the defendants, or such of them as participated in the misappropriation of the money or knowingly acquiesced in the misappropriation of the money by subordinate employees, would be liable in this action."

In these instructions the court denominated the fund in question a "trust fund," and stated the elements of which it is composed, one of them being that the collection when forwarded was accompanied with directions to remit. As to the knowledge necessary to make the defendants liable the court said, in substance,

that they must have known that the money collected was a "trust fund," and misappropriated to the use of the trust company. If they possessed this knowledge they would necessarily know of the directions to remit, and that a conversion was intended. We think the instructions given cover all that was necessary to be stated to the jury.

In the argument it was claimed that by the refusal to give the instructions requested the court failed to present to the jury the question of conversion with intent to defraud, and apparently this is the real objection made to the court's instructions. We do not think this idea is necessarily conveyed by the language used in the instructions requested, nor do we think that a fraudulent intent is an essential element of this case. When the managing agents of a trust company mingle money collected for another with the current funds of the company, for use in its business, in violation of the express directions of the owner to remit, or knowingly permit their subordinates so to do, and the fund is thereby lost, such agents will be personally liable to the owner therefor, although at the time of such misappropriation it was the intent of such managing agents to account for and return the money to the owner upon demand.

We think that this court in its former decision in this case touched the limit of liberality in favor of trust-company officers. The rapidly increasing volume of important business transacted between persons widely separated from each other, wherein trust companies and similar agencies are necessarily employed, demands that the officers of such agencies be held to a strict performance of the duties confided to them, and we do not wish further to limit the rule of their responsibility already adopted.

The plaintiff in error makes complaint that the trial court admitted a letter written by defendant Noble to A. W. Ferrin, treasurer of the plaintiff. The letter was written after the assets of the trust company had

Sweet v. Savings Bank.

passed into the possession of a receiver. When the letter was offered Sweet, Noble and Sheldon were co-defendants. The letter was admissible against the writer, Noble, but not against Sweet, his codefendant. Proper objection was made by Sweet to its admission as incompetent and not binding on him, but the objection was overruled. As the evidence was proper against Noble, the court could not have sustained the objection and kept the evidence from being read to the jury. The most the court could have done would have been to instruct the jury then, or later, that it could only be considered as to Noble. Such an instruction would have been proper, but it was not given. No request was made for such an instruction. The letter was properly admitted in the case. If any error was committed it was because of the failure of the court to limit its application. Such an instruction, however, is not of a general nature, such as the law requires the court to give without request. As no request was made we cannot say that the omission was material error. In the absence of such a request at the close of the evidence, a court may assume that the objection has been waived.

Another objection made by the plaintiff in error is that the verdict against him is not sustained by the evidence. After a careful examination of the evidence we think it not only justified the verdict against Sweet, but would have sustained one against his codefendants. Sweet was president of the company; a large part of its business passed through his hands and was brought to his personal attention. He had ample opportunity to know about the transaction in question. It is true that this was one of a mass of items presented to him, and might have failed to make any distinct impression upon his mind. Whether it did or not was a proper question for the jury. The judgment is affirmed.

All the Justices concurring.

JACOB DETHAMPLE V. LAKE KOEN NAVIGATION,
RESERVOIR AND IRRIGATION COMPANY.

No. 14,452. (85 Pac. 544.)

SYLLABUS BY THE COURT.

1. EMINENT DOMAIN—*Easement—Damages*. In a condemnation proceeding for a perpetual easement in an entire tract of land which has only a surface value, the basis of the owner's right of recovery is the value of the land, the same as if the fee had also been appropriated.
2. ——— *Instructions—Measure of Damages*. In such a proceeding the only question of fact to be submitted to a jury is the value of the land at the time of condemnation, and it is misleading and erroneous for the court to instruct the jury that only an easement was appropriated by the condemnation proceedings, and that the fee remains in the owner, unless they are further instructed that in determining the owner's damages no value should be attached to the remaining fee.

Error from Barton district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed February 10, 1906. Reversed.

James W. Clarke, for plaintiff in error.

Eaton & Loomis, and *D. A. Banta*, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: This action originated in a proceeding to condemn the plaintiff's lands. From the award of the commissioners he appealed to the district court, where he recovered a judgment for an amount which he claims was grossly inadequate, the result, as he now contends, of errors committed by that court in excluding testimony, in admitting incompetent testimony prejudicial to his rights, in giving misleading and erroneous instructions, and in submitting special questions to the jury upon a wrong theory adopted by the court as to the methods of proving the value of his land. The land condemned was a

Dethampl v. Irrigation Co.

quarter-section of unimproved prairie land, except about fifteen or twenty acres which were, or had been, in cultivation. The condemnation was for a perpetual easement in the entire tract for a reservoir site. It is a part of a large body of land condemned by the Lake Koen Navigation, Reservoir and Irrigation Company, which it was intended to submerge. There was no evidence that plaintiff's land had, or is ever likely to have, any value other than its surface value. In such cases the basis of the owner's damages is the value of the land condemned. (*K. C. W. & N. W. Rld. Co. v. Fisher*, 49 Kan. 17, 30 Pac. 111; *Cohen v. St. L. Ft. S. & W. Rld. Co.*, 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; *C. K. & W. Rld. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083; *Hollingsworth et al. v. The Des Moines & St. Louis R'y Co.*, 63 Iowa, 443, 19 N. W. 325; *L. R. Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *Railway v. Combs*, 51 Ark. 324, 11 S. W. 418; *Cooley's Const. Lim.*, 7th ed., 819; *Giesy v. C. W. & Z. Railroad Co.*, 4 Ohio St. 308; *Robb v. Maysville & Mt. Sterling Turnpike Road Company*, 60 Ky. 117.)

Where an entire tract of land is appropriated, and there is no evidence that it has any value other than its surface value, the fee, which remains in the owner, has no value that can be estimated; consequently, such item should not be considered in determining the amount of damage sustained by the owner. The basis of his damages is the same as if the proceedings had divested him of the fee. (*Cummins v. The Des Moines & St. Louis R'y Co.*, 63 Iowa, 397, 19 N. W. 268; *Clayton v. The Chicago, Iowa & Dakota R'y Co.*, 67 Iowa, 238, 25 N. W. 150.)

With this understanding of the law controlling condemnation proceedings where the condemnation is for a perpetual easement and of an entire tract of land, with no value but its surface value, we will consider the assignments of error. The plaintiff, in attempting

to prove the market value of the land at the time it was condemned, caused several witnesses to testify to that value, without any objections from the defendant as to their qualifications. Afterward, however, upon the motion of the defendant, the court withdrew all the testimony given by these witnesses, upon the ground that they had not shown themselves competent to speak on the question of market value. This is assigned as error. An examination of the testimony of these witnesses satisfies us that none of them qualified to testify to the market value.

The second assignment is the admissibility of the evidence of M. B. Fitts as to what was a fair and reasonable value per acre of the land at the date of its condemnation. This witness qualified himself to give his opinion. Perhaps it should not have been given great weight by the jury because of his slight acquaintance with the land, but there was no error in permitting him to give his opinion.

Error is also predicated on the giving of the eighth instruction, which reads:

"The jury are further instructed that the sale of a piece of real estate for a certain sum and at a certain time does not necessarily establish or prove that the value of the real estate was the price paid for it in such sale. Circumstances might be such that the owner desired to sell the same and was willing to take less than its real value, and on the other hand the purchaser might for certain reasons be willing to pay more than the real value of the property, but I instruct you that there is no legal presumption, in the absence of any proof, that an owner of real estate, when he makes a sale of the same, sells it for less than it is reasonably worth, nor is there a presumption that the purchaser of real estate in making his purchase is giving more than it is reasonably worth; and the fact, if it is a fact, that the real estate in question was sold for a given price at a given time is a circumstance which the jury may very properly consider in determining what the value of the real estate was at such time, if you can determine it from the evidence in the case."

Dethample v. Irrigation Co.

The defendant introduced testimony at the trial that two years prior to the condemnation the plaintiff had purchased the land for \$480. It also offered testimony tending to show that this particular land had increased in value \$75 between the date of such purchase and the condemnation. The instruction was given upon the theory that the jury might accept the purchase-price as a basis of estimating the value of the land, and that this amount, plus the increase, would be a proper method of determining its present value. If such a method of proving value can ever be adopted in any case, which is doubtful, it was error to adopt it in this case. A number of witnesses offered by both parties qualified under the well-established rules of evidence to testify to the value of the land at the time of its appropriation, and gave their opinions. There was no lack of competent evidence on this question on either side. There was no occasion, therefore, for the court to introduce a new and unprecedented method of ascertaining values. The vice of this instruction is made more apparent upon an examination of the special questions submitted to the jury, and their answers thereto, as follow:

"Ques. How much did the plaintiff pay for the land when he bought it, on the 30th day of March, 1898?
Ans. \$480.

"Q. How much do you find the value of the land in controversy to have been on the 4th day of June, 1900?
A. \$555.

"Q. What do you allow the plaintiff per acre for his land? A. $\$3.46\frac{7}{8}$ per acre.

"Q. How much did the land in controversy increase in value from March 30, 1898, to June 4, 1900? If you find that there was a material increase in the value between these periods, then state what caused the increase in value. A. \$75.

"Q. What crops were produced upon the land during the year 1900? A. Hay crop.

"Q. What do you find the market value of the land in question to have been on June 4, 1900? A. \$555."

From these questions and answers it is apparent

that the jury accepted the method indicated by the instruction, and reached their conclusion of value from the purchase-price, plus the increase between the date of the alleged purchase and the condemnation, and they accepted the purchase-price as this basis in the absence of any evidence that it was the fair and reasonable value of the land at the time. In this they followed the instruction "that there is no legal presumption, in the absence of any proof, that an owner of real estate, when he makes a sale of the same, sells it for less than it is reasonably worth, nor is there a presumption that the purchaser of real estate in making his purchase is giving more than it is reasonably worth; and the fact, if it is a fact, that the real estate in question was sold for a given price at a given time is a circumstance which the jury may very properly consider in determining what the value of the real estate was at such time."

Following this instruction, and in answer to the special questions submitted for that purpose, the jury found that plaintiff paid \$480 for the land two years before the condemnation, that it had increased \$75 in value, and that the sum of these was the value of the land when condemned. The price paid for the land two years prior to the condemnation was not a proper basis upon which to determine the present value of the land. Such a method introduced two collateral issues: (1) Was the price paid the fair and reasonable value of the land at the time? This was a question of fact, and could not be established by legal presumptions. (2) What was its increase or decrease in value for the period intervening between the purchase and the condemnation? Either of these questions was as difficult of proof as the present value of the land. We conclude, therefore, that the court erred in giving this instruction, and also in submitting the special questions quoted to the jury.

The remaining assignment of error that we find it

Dethample v. Irrigation Co.

necessary to comment upon is in giving the following instruction:

"The court instructs the jury that the defendant corporation does not by its proceedings appropriating the plaintiff's land, or by the award in this case, acquire the fee or the absolute title to the lands appropriated. What it does acquire is the right to use and occupy the land for the purposes for which it was appropriated, and the owner of the land has at all times the right to possess and use the land for any purpose not inconsistent with the purpose for which it was appropriated; and in case of the abandonment of the use of the land by the defendant for the purposes for which it was appropriated the entire possession and title to said land revert to the plaintiff."

This instruction is a correct statement of the law, but it has no application to any fact submitted to the jury, or to any fact that could have been properly submitted to them in this case, and had a tendency to confuse them in arriving at a correct verdict. The only question of fact for their consideration was the value of the land condemned, and this should have been determined the same as if the fee had passed. This simple question should have been submitted without reference to where the fee lodged. A jury understand that every instruction given is intended to assist them in deciding some question of fact submitted for their determination. It is common knowledge that a fee in real estate is a thing of value, and, when the court instructed the jury that the company by its condemnation proceeding only acquired an easement in the land and that the plaintiff still retained the fee, naturally they must have attached value to the fee, and by intelligent reasoning and an innate desire to do justice must have concluded that plaintiff ought not to recover for a thing of value which he retained.

The judgment is reversed, and the cause remanded.

MASON, SMITH, PORTER, GRAVES, JJ., concurring.

JOHNSTON, C. J. (dissenting): In reversing the judgment two propositions of law are declared, the second being only a slight qualification or extension of the first, and in neither of them am I able to concur, nor do I find any grounds for reversing the judgment. The nature and extent of the interest taken by condemnation are always proper considerations in fixing the compensation of the owner. It was an easement that the defendant was seeking to condemn and for which the plaintiff was asking compensation. Nothing else was involved, and no one connected with the case claimed that any other or greater interest was to be condemned. The owner is only entitled to be compensated for such estate or interest as has been taken from him. That is a correct rule of law, and I have difficulty in understanding how the statement of a true rule can be made a ground for reversal.

It may be that there is little difference between the value of a perpetual easement in land and that of a fee title to it, but I think it would have been error for the court to have told the jury that they might award the owner the same compensation as if he had been divested of a greater interest than the one actually taken. Cases are cited where courts refused to reverse for a refusal to instruct as to the difference between an easement and a fee. But these rulings were based on the theory that the difference in value was so small as to come within the doctrine of *de minimis non curat lex*. Rulings refusing to reverse for errors which were not prejudicial differ materially from a reversal for giving an instruction which is theoretically correct. Even if the law had not been accurately stated the rule of the cases cited, that the difference in values of an easement and a fee simple is so small as not to be within the notice of the law, would work an affirmance of this judgment.

It devolved upon the plaintiff to show the value of

Dethample v. Irrigation Co.

the interest taken, and not of some other interest, and he has no reason to complain that the court stated correctly the interest appropriated, and for which he was asking compensation. If his testimony did not measure up to the rule it was not the fault of the court, nor did it justify the court in stating a wrong rule. If the interest of the plaintiff had been only a leasehold, or a life-estate, compensation would have been limited to the rights of which he was deprived, and the court must have so advised the jury. It was no less its duty to advise the jury of the character of the interest taken from plaintiff. Aside from this, every one connected with the case appears to have understood alike the nature of the interest taken, and the witnesses for both parties testified freely about the market value of the land, without quibbling as to the interest remaining in the owner.

Something is said about an instruction as to the circumstances of a sale of the property two years before the condemnation, but as this instruction was based upon testimony of which no complaint is made there is little room for objection. The testimony being before the jury, it was proper to instruct them as to its weight and application. In my view the instruction given, qualified as it was by the court, is sound law, and is an instruction which is frequently given in the courts of this state. In fact, the entire charge appears to have been carefully abstracted from the decisions of this court. The last-mentioned instruction, however, is probably not regarded as reversible error, as it is not mentioned in the syllabus of the decision made.

I think the judgment should have been affirmed, and I am authorized to say that Mr. Justice BURCH joins me in this dissent.

FLORENCE M. BEACHY *et al.* v. CHARLES SHOMBER.

No. 14,454. (84 Pac. 547.)

SYLLABUS BY THE COURT.

1. GUARDIAN AND WARD—*Notice of Application to Sell Real Estate.* The notice required by the statute to be given to a ward of the hearing of his guardian's application for leave to sell his real estate is jurisdictional, and a deed made without such notice's having been given is void, and subject to collateral attack.
2. PRACTICE, SUPREME COURT—*Confirmation of Guardian's Sale—Presumption as to Notice.* Where the record shows the giving of a notice to a ward of the hearing of his guardian's application for leave to sell his real estate, and such notice is for any reason unavailing, it cannot be presumed from the fact that the sale was confirmed by the probate court that any other notice was given.
3. GUARDIAN AND WARD—*Petition—Statutory Conditions—Validity of Deed.* A guardian's deed will not be held void upon a collateral attack merely because the petition of the guardian for leave to sell his ward's real estate does not affirmatively show the existence of the conditions which under the statute authorize such sale.
4. ——— *Report of Appraisers—Construction.* An ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will if possible be given a construction that will uphold the deed.

Error from Franklin district court; DENNIS MAD-DEN, judge *pro tem.* Opinion filed February 10, 1906. Reversed.

Gamble & Costigan, and *W. H. Clarke*, for plaintiffs in error.

Deford & Deford, for defendant in error.

The opinion of the court was delivered by

MASON, J.: In an action of ejectment the plaintiffs challenged the validity of a guardian's deed relied upon by the defendant. Findings of fact were made under which the trial court held that, although there were various irregularities in the proceedings

Beachy v. Shomber.

upon which it depended, the deed was not absolutely void. The plaintiffs prosecute error.

The findings show that a notice of the hearing of the application of the guardian for leave to sell the real estate of his wards was served upon them two days after the time therein named for such hearing. The actual hearing was had two weeks later. The trial court held that the service of the notice shown by the record was insufficient, but that a presumption of the giving of a new notice arose from the confirmation of the sale, and upon this theory sustained the deed. This view we are constrained to regard as erroneous. The statute in requiring a notice of the hearing of a guardian's application to sell real estate to be served upon the ward makes such notice jurisdictional, although in the absence of such requirement it is not generally so regarded. (15 A. & E. Encycl. of L. 63.) If an inference of the giving of a notice was derivable from recitals found elsewhere in the proceedings, such recitals must be deemed to have reference to the one notice affirmatively shown by the record, and no presumption of a different notice's having been served can be invoked in support of the deed. (*Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161.)

The evidence is not preserved in the record brought here, and by reason of the theory adopted by the trial court there was no occasion for finding the facts in as full detail as would otherwise have been necessary. As a result of this situation the order of reversal will not include a direction for entering judgment, but merely one for granting a new trial, and as upon a second hearing the facts regarding the notice may be presented in a different aspect it becomes important to consider the other objections made to the deed.

The guardian's petition for leave to sell set out as a reason for such sale "that it will be for the interest of said minors that said real estate be sold for the following reason, viz., to pay debts of the estate." This falls far short of showing affirmatively conditions

Beachy v. Shomber.

which under the statute will authorize a sale, and which exist only "either when such sale . . . is necessary for the minor's support or education, or where his interest will thereby be promoted by reason of the unproductiveness of the property, or [on] its being exposed to waste, or any other peculiar circumstances, making it to the interest of the minor to have the property sold." (Gen. Stat. 1901, § 3299.) Yet the expression "to pay debts of the estate" may be interpreted to refer to indebtedness necessarily incurred by or for the minors themselves, and it is conceivable that upon the hearing facts may have been shown sufficient to bring the case within the very terms of the statutory requirement. We do not think the petition was so defective as to render the proceedings under it absolutely void, or the deed open to collateral attack.

"Whether the petition is in proper form, or sets forth sufficient facts, are matters for the determination of the court in the exercise of its jurisdiction. Of course, if a mere blank paper is filed as a petition, jurisdiction would not attach, because there would be nothing for the court to act upon; but when a petition contains sufficient matters to challenge the attention of the court as to its merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in its allegations, the cause is properly before the court, and jurisdiction is not wanting. This principle underlies all judicial proceedings." (*Bryan v. Bauder*, 23 Kan. 95, 97.)

The real estate of the minors which was the subject of the sale was an undivided one-third interest in a city lot, which interest was sold for \$333.33. The appraisalment read:

"We, the above-named appraisers, do hereby certify that we have viewed the following-described real estate situated in said county, to us shown by U. M. Beachy, as guardian, to wit, one-third interest or part in lot 23, block 98, Main street, in the city of Ottawa, and we do hereby appraise the same at $\frac{1}{3} = \$400$ 1200 dollars, amounting in all to the sum of twelve hundred dollars."

It is claimed that this shows that the interest of the minors in the lot was appraised at \$1200, and that a sale for less than three-fourths of that amount was therefore void. The report of the appraisers was ambiguous, but was open to the construction that in their judgment the lot itself was worth \$1200, and the interest of the minors \$400. Indeed, there seems no other reasonable inference to be drawn from their inserting therein " $\frac{1}{3}$ —\$400." It might be argued that as there were three minors who were tenants in common of the property to be sold the division by three was intended to show the value of the interest held by each, but as all the proceedings had regard to the sale of their collective titles, and not to the separate sale of the title of each, this hypothesis is untenable. The ambiguity appears to have resulted from the careless use of a printed blank.

It seems probable that the statute of limitations (Gen. Stat. 1901, § 4444, subdiv. 2) has barred the claim of the oldest of the plaintiffs, but this cannot be ascertained from the record, which is silent as to the date of the recording of the guardian's deed.

The judgment is reversed, and a new trial ordered.

All the Justices concurring.

Remsberg v. Cement Co.

SIMON R. REMSBERG *et ux.* v. THE IOLA PORTLAND CEMENT COMPANY.

No. 14,455. (84 Pac. 548.)

SYLLABUS BY THE COURT.

1. NUISANCE—*Storing of Dynamite—Question of Fact.* Whether the storing of dynamite, conceded to be a lawful business, is a nuisance *per se* by reason of inappropriate location is, in this case, a question of fact as to whether persons and property in proximity thereto would be exposed to danger that is unavoidable, and inherent in the business when properly conducted.
2. ——— *Petition for an Injunction—Proper Allegations.* Facts tending to show that such business was being located in unnecessarily close proximity to a public highway frequently traveled by plaintiffs' and their family, and to the residence and other buildings of plaintiffs, are proper allegations in a suit to enjoin such business as a nuisance.
3. EVIDENCE—*Expert—Effect of Explosions of Dynamite.* The opinion of a witness, qualified to speak as an expert, upon the effect upon persons and buildings of the explosion of certain amounts of dynamite within certain distances is proper evidence to be considered in such a case.

Error from Allen district court; OSCAR FOUST, judge. Opinion filed February 10, 1906. Reversed.

STATEMENT.

PLAINTIFFS in error brought suit in the district court of Allen county to restrain the defendant from erecting a powder-house for the purpose of storing a large amount of explosives on land of its own adjoining plaintiffs' premises, not far removed from plaintiffs' buildings, and close to a public highway alleged to be frequently traveled by plaintiffs and their family and the public generally. The plaintiffs filed an amended petition, and a portion thereof was stricken out on motion of the defendant. At the trial, after the plaintiffs had introduced their evidence, the court sustained a demurrer thereto, and rendered judgment in

favor of the defendant. Plaintiffs bring the case here for review.

L. Philip Coblentz, and *Travis Morse*, for plaintiffs in error.

Baxter D. McClain, for defendant in error; *McClain & Apt*, of counsel.

The opinion of the court was delivered by

SMITH, J.: On the showing made by plaintiffs as to the amount in controversy, the motion of defendant to dismiss is denied.

The first error assigned is the striking out of three portions of the petition, viz.: (1) The description by subdivisions of all of a large tract of land (except one eighty-acre tract) which was alleged in the petition to belong to the defendant, "forming a tract which lies near and adjoining to the said property of these plaintiffs;" (2) in the allegation that by its use and liability to explode the magazine was a common nuisance, a menace, etc., the words "a common nuisance;" (3) all of subdivision 8 of the petition. The first portion stricken out was the description of a large tract of land upon which it was alleged in subdivision 8 there were many locations, remote from highways and buildings, where a magazine could be erected with little danger to life or property.

In the determination of such a case a court of equity should consider just such facts as are here alleged. There is no claim that a cause of action was embraced in these allegations that was not in the original petition. If, as alleged, the building and the using of the magazine at the place intended would greatly endanger plaintiffs' property and the lives of their family, and if, as alleged, the defendant owned other lands upon which, without great inconvenience, such magazine could be erected and used without danger or with much less danger to persons and property, a court of

equity might well interfere by injunction. Also the allegation that the proposed building was, by reason of its use, a common nuisance seems entirely permissible, although the plaintiffs, to maintain the suit, would have to prove that they would be affected differently than the community in general by the alleged nuisance. So far we think the court was in error. If, as conceded, these facts were proper matter of proof, they were proper facts to plead. The latter part of subdivision 8, however, relating to the explosion of a magazine some time before, tendered no relevant issue and might well have been stricken out.

The court permitted Mr. Crane, who testified that he was an instructor in mining engineering in the University of Kansas, and who also testified to no inconsiderable amount of practical experience with explosives, to testify to many facts and numerous opinions relating to the effect of explosions of dynamite on persons and buildings at certain distances from the place of explosion. Many of these facts and opinions testified to were certainly matters of technical knowledge and science, and were proper matters of expert testimony; but the court afterward refused to consider this evidence, on the ground that the evidence was in effect a repetition of what the witness had read in books and was not based upon his personal observation and experience. In this there was error. The witness, in the main at least, did not undertake to repeat what any author or book said on a given subject, but gave his opinion from the weight of authorities as it appeared to him, necessarily calling his own experience to his aid in determining such weight.

Much space is devoted in the briefs to the discussion of the question whether the structure and the intended use thereof as alleged would make it a nuisance *per se*, or whether a careless or negligent use thereof would be requisite to make it a nuisance.

"A nuisance *per se* is an act, thing, omission, or

Brown v. The State.

use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances." (21 A. & E. Encycl. of L. 683.)

A lawful business is not generally a nuisance *per se*, but may become so by being located in an inappropriate place or by being kept in an improper manner. (21 A. & E. Encycl. of L. 684, *et seq.*) It is therefore largely a question of fact whether the storing of a large quantity of dynamite in proximity to buildings is, when properly done, dangerous to the lives or property of persons located or living and passing within certain distances therefrom.

The evidence, or at least much of the evidence of the witness Crane, should have been considered and given such weight, if any, as it was entitled to in determining this question.

Other errors are assigned, but as the same questions are not likely to arise on a retrial they are not discussed. The judgment of the district court is reversed, with instructions to grant a new trial.

All the Justices concurring.

THOMAS BROWN *et al.*, as *County Commissioners, etc.*,
et al., v. THE STATE OF KANSAS, *ex rel.* C. C. Coleman,
as *Attorney-general*.

No. 14,459. (84 Pac. 549.)

SYLLABUS BY THE COURT.

COUNTY COMMISSIONERS—*Contract for Publication of Personal-property Statements Held Ultra Vires.* The board of county commissioners of Barton county made a contract with the publisher of the official county paper to publish a list showing the personal-property statements of all persons in the county returned by the assessors, with the amount of personal property listed or assessed against each person, for which publication and the mailing of a copy to each person

73	69
77	542
777	543

Brown v. The State.

named therein the board agreed to pay the publisher \$180. The contract was entered into and carried out in good faith. *Held*, that the contract was *ultra vires* and void, and that a permanent injunction was properly granted in a suit commenced on the relation of the attorney-general to enjoin the payment of the contract price.

Error from Barton district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed February 10, 1906. Affirmed.

STATEMENT.

THE board of county commissioners of Barton county entered into a contract with the firm of Stoke & Feder, in the city of Great Bend, to publish in the *Barton County Democrat*, the official county paper, a list showing the name of every person in the county making a personal-property statement for the year 1904, the total amount which each person returned to the assessors for taxation, and a list of each person claiming personal property exempt from taxation, for which publication, and the mailing to each person named in the list one of the papers containing the same, the board agreed to pay to the firm of Stoke & Feder the sum of \$180. W. E. Stoke was the public printer of Barton county, elected and qualified under chapter 101 of the Laws of 1899. The contract was entered into in good faith, and was carried out in full, and a bill was presented to the board of county commissioners for the contract price agreed upon. This suit was commenced on the relation of the attorney-general to enjoin the payment of the contract price, the county attorney of Barton county having declined to bring the suit. From the judgment granting a permanent injunction defendants bring the case here for review.

James W. Clarke, and Osmond & Cole, for plaintiffs in error.

C. C. Coleman, attorney-general, and D. A. Banta, for The State.

The opinion of the court was delivered by

PORTER, J.: There is but one point necessary to consider in this case: Did the board of county commissioners have authority to make the contract in question? The county is a *quasi*-municipal corporation, and as such can exercise only those powers expressly conferred and such others as are necessarily or fairly implied in, or which are incidental to, the powers expressly granted. Beyond these it takes nothing by implication. It was said in *City of Leavenworth and others v. Norton and others*, 1 Kan. 432, 436, that the authorities to this effect are too numerous and too well known to need citation. (See, however, 7 A. & E. Encycl. of L. 926, 942; *Felker v. Elk County*, 70 Kan. 96, 78 Pac. 167.) The powers of the county generally are stated in section 1603 of the General Statutes of 1901, as follow:

"That each organized county within this state shall be a body corporate and politic, and as such shall be empowered for the following purposes: *First*, to sue and be sued; *second*, to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law; *third*, to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants; *fourth*, to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers; *fifth*, to exercise such other and further powers as may be especially conferred by law."

And in section 1605 it is provided that "the powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." The express powers of the board are enumerated in section 1621. It is not claimed by plaintiffs in error that there is found anywhere in the statutes the express power to make the contract in question, but it is claimed that the power is necessarily implied from

the general and express powers conferred upon the board, and *Commissioners of Leavenworth Co. v. Keller*, 6 Kan. 510, is relied upon. There the authority of the board to make a contract with the register of deeds for the compilation of a tract-index of deeds was upheld, but the court found the power necessarily implied from the express power conferred by the first clause of section 1621 of the General Statutes of 1901, which reads: "To make such orders concerning the property belonging to the county as they may deem expedient." The records in the office of the register of deeds are county property. If by long use they should require rebinding the power to contract for that purpose would be clearly implied. If by long use the indexes should become worn so that the convenience of the public required new ones, or if the records had never been properly indexed, the board would have the implied power to provide what should be necessary. The contract here was not made with reference to any "property belonging to the county," and we must therefore look elsewhere for the implied power to make it.

In *Grannis v. Board of County Comm'rs*, 81 Minn. 55, 83 N. W. 495, a contract made by the board of county commissioners by which a person was employed to discover unassessed and untaxed personal property in such county, for which he was to receive one-half of all taxes paid into the county treasury as the result of his labors, was held *ultra vires* and void. The powers of counties and county boards in Minnesota appear to be much the same as in this state. There the county board has general charge and supervision of the county affairs, and general authority over its finances, and care of its property and rights. It was held that while the county was interested and concerned in the matter of the collection of taxes it was not charged with the duty of seeing to it that all such property was assessed and placed upon the tax-

Brown v. The State.

rolls, because those duties devolved upon other officers. The court said :

"The matter of unearthing and discovering property which has escaped taxation is not only not necessary to the exercise of the corporate powers of a county, but is beyond its express or implied authority." (Page 58.)

The supreme court of Iowa, in the case of *Disbrow v. Supervisors of Cass County*, 119 Iowa, 538, 93 N. W. 585, held a similar contract to be valid and binding upon the county. There was a statute, however, expressly providing that the board of supervisors should have power to appoint an attorney to prosecute an action to recover omitted taxes.

There is much conflict in the decisions with respect to the authority of county boards to contract for the ferreting out of unlisted property and for recovering taxes thereon, but the cases in general are of little assistance in determining the question here, for they often turn upon the existence of a special statute or upon powers of the county board granted by express provision of law. If the power existed here it must be implied from the general power referred to in the fourth clause of section 1603, taken in connection with the fifth clause of section 1621 and section 1646 of the General Statutes of 1901. The fourth clause of section 1603 reads as follows: "To make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers." The fifth clause of section 1621 is as follows: "To represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law."

Section 1646 gives the board "exclusive control of all expenditures accruing, either in the publication of delinquent tax-lists, treasurer's notices, county printing, or any other county expenditures." These are

Brown v. The State.

the sections of the statute which plaintiffs in error mainly rely upon, except certain sections of the general tax laws which will be referred to hereafter.

The fourth clause of section 1603, *supra*, authorizes the county "to make all contracts and do all other acts in relation to the property and concerns of the county." The contract entered into did not relate to any property of the county. Did it relate to the "concerns of the county, necessary to the exercise of its corporate or administrative powers"? If it did the board had power to make it, unless limited by section 1621 or some other statutory provision, for the powers conferred upon the county are to be exercised by the board. It may be said that the county is greatly concerned that all citizens shall correctly list their personal property for the purpose of taxation, and this is true; and it is also true that the duty of citizens in this respect is often flagrantly disregarded and that the interests of the county suffer thereby. This general power conferred upon counties by the fourth clause of section 1603 must be construed, however, in connection with the fifth clause of section 1621, by which it is provided that the board shall have the "management of the business and concerns of the county, *in all cases where no other provision is made by law.*"

By reference to section 7599 of the General Statutes of 1901 we find that "other provision" has been made for correcting this evil, and that certain duties are imposed upon the board of county commissioners, and certain express powers conferred upon it in relation thereto. That section provides that after the assessment rolls have been returned the board of county commissioners is given certain powers for the correction of assessments, if it shall have reason to believe that any person has given a false statement to the assessor or that the assessor has not returned the full amount required by law to be assessed against

such person; and it may well be argued that if the legislature intended to confer upon the board the power to make a contract like the one in question, long prior to the time the duties devolved upon the board to act with reference to assessments of personal property, it would have been found in section 7599, and in clear, unmistakable terms. The provisions of this section cover the whole subject of the inadequate listing of personal property, as well as all the duties and powers conferred upon the board of county commissioners in reference thereto, and necessarily must be held to limit the powers of the board in respect to these particular "concerns of the county."

In *Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340, it was held that the county commissioners, sitting as a board of equalization, have no power to add to a personal-property statement as returned by the assessor any property not already listed, for the reason that there is no express power given them so to do; and the court in the opinion comments upon the fact that "there was no want of power properly lodged to enable the proper authorities to secure an assessment of all the personal property of the plaintiff." (Page 122.) The same power referred to is still in existence and provided for in section 7599. The fact that the subject is one otherwise fully provided for takes it out of the scope of the fifth clause of section 1621, because that clause has no application to cases where provision is otherwise made by law.

Section 1646 of the General Statutes of 1901 gives the board "exclusive control of all expenditures accruing, either in the publication of delinquent tax-lists, treasurer's notices, county printing, or any other county expenditures." The contract was not made with reference to delinquent tax-lists or treasurer's notices, and whether it is embraced in the term "county printing" or "other county expenditures" is the question involved in this case. If the board had

Long v. Thompson.

authority to make the contract, it was a lawful "county expenditure" and would naturally be classed in that case as "county printing." We conclude, therefore, that it does not fall within the implied powers of the board, necessary or incidental to any power expressly granted, for the reason that it does not involve the care or management of any property belonging to the county or any business or concerns of the county, except those for which provision has been otherwise made. The judgment is affirmed.

All the Justices concurring.

SOL. L. LONG AND E. B. PLACE, *as Partners, etc.*, v.
I. N. THOMPSON.

No. 14,463. (84 Pac. 552.)

SYLLABUS BY THE COURT.

1. AGENCY—*Sale of Real Estate—Commission.* An owner of real estate who desires to sell the same and who employs an agent to procure a purchaser therefor, at a price stated and upon terms to be thereafter mutually agreed to by such owner and purchaser, is liable to such agent for a commission when the latter produces a buyer who agrees with the owner to take the land at the price and upon the terms fixed by such owner, and is ready, willing and able to carry out the contract, whether a sale is actually made or not.
2. ——— *Petition Held Sufficient.* The amended petition in this case examined and found sufficient.

Error from Elk district court; GRANVILLE P. AIKMAN, judge. Opinion filed February 10, 1906. Reversed.

Sol. L. Long, C. S. Beekman, and Oscar M. Yount,
for plaintiffs in error.

W. S. Fitzpatrick, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: The plaintiffs were real-estate agents at Grenola, Kan. The defendant was the owner of land in that vicinity which he desired to sell. He employed plaintiffs to procure a purchaser, and agreed to pay them the sum of \$300 therefor. The agents claim that they found a purchaser, but the owner refused to pay the commission. An action was brought by them in the district court of Elk county to recover the amount due for their services. A general demurrer was sustained to the first cause of action stated in the petition. Thereafter an amended petition was filed. A general demurrer was filed to the first cause of action in the amended petition, and sustained. Plaintiffs declining to plead further, judgment was entered against them for costs as to the first cause of action, and they bring the case here, assigning that ruling as error. Judgment was rendered in favor of plaintiffs on the remaining cause of action, upon confession of defendant.

The cause of action demurred to, aside from the preliminary averments, was stated in the amended petition as follows:

"Second: That on or about the ——— day of July, A. D. 1902, said defendant employed plaintiffs to procure a purchaser for certain tracts of land owned by him and situate in the counties of Elk and Cowley, in the state of Kansas, for the sum of seven thousand three hundred dollars, and said defendant then and there promised and agreed to pay to the said plaintiffs the sum of three hundred dollars for procuring a purchaser at the sum aforesaid, said sum to be paid upon such terms and in such manner as could be mutually agreed upon between the purchaser so procured by plaintiffs and the said defendant.

"Third: That in pursuance of said agreement, verbally had between plaintiffs and defendant, said plaintiffs procured a purchaser for defendant's land and took such purchaser to said defendant, and such purchaser, so as aforesaid procured by plaintiffs for de-

fendant's said land, and the said defendant then and there agreed upon the sale of said land for the aforesaid sum of seventy-three hundred dollars, and agreed upon the times and terms of payment thereof, and that said purchaser was ready, able and willing to pay said price for said land; said agreement of sale between the purchaser, so as aforesaid procured, and said defendant, as to the price of said land and the terms of payment for same, being verbal."

These allegations stand alone; they are not in the least affected by any statements in either the original petition or the second cause of action in the amended petition. There was no motion to make the allegations of the pleading more definite and certain; therefore, they must be construed liberally in favor of the pleader. The petition shows that these real-estate agents were employed to procure a purchaser for the land at a price stated by the owner and upon terms to be thereafter mutually agreed upon; that such purchaser and the owner fully agreed to the price and all the terms of a sale; and that the purchaser was ready, able and willing to carry out his agreement. The contract alleged required nothing further. The averments of this cause of action, when liberally construed, are equivalent to a full and specific statement of a contract of employment, the complete performance thereof, and a refusal to pay therefor. We think they state a cause of action.

This case, as pleaded, does not fall within the category of cases wherein agents are employed to effectuate a sale, and therefore decisions in such cases are not necessarily important here. For this reason some of the cases cited by counsel are inapplicable. The case of *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918, cited by the defendant in error, has been distinguished, limited and modified by several subsequent decisions of this court. (*Betz v. Land Co.*, 46 Kan. 45, 26 Pac. 456; *Neiderlander v. Starr*, 50 Kan. 770, 33 Pac. 592; *Stewart v. Fowler*, 53 Kan. 537, 36 Pac. 1002.) Later cases fully recognize the difference here drawn between an

Leonard v. Steel Co.

employment to sell and one merely to find a purchaser. (*Sandefur v. Hines*, 69 Kan. 168, 76 Pac. 444; *Sullivant v. Jahren*, 71 Kan. 127, 79 Pac. 1071; *Helling v. Darby*, 71 Kan. 107, 79 Pac. 1074; see, also, *Knapp v. Wallace*, 41 N. Y. 477; *Kalley et al. v. Baker*, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542.)

In view of this conclusion the question whether an oral contract for the sale of real estate can be enforced or not need not be considered. Such a contract is sufficient for the employment of a real-estate agent, and that is the only contract involved in this controversy.

The judgment of the district court is reversed, with directions to overrule the demurrer and proceed in accordance with the views herein expressed.

All the Justices concurring.

S. L. LEONARD V. THE AMERICAN STEEL AND WIRE
COMPANY.

No. 14,470. (84 Pac. 553.)

SYLLABUS BY THE COURT.

FOREIGN CORPORATION—*Not Authorized to do Business—Pleading.* The defense that a foreign corporation has not been granted authority to carry on business within the state is not raised by a general denial, but must be specially pleaded.

Error from Finney district court; WILLIAM EASTON HUTCHISON, judge. Opinion filed February 10, 1906. Affirmed.

G. L. Miller, for plaintiff in error.

W. R. Hopkins, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: The American Steel and Wire Company recovered judgment against S. L. Leonard upon three promissory notes. The plaintiff's petition averred that it was a corporation duly incorporated under the laws of the state of New Jersey, and that it was lawfully doing business in the state of Kansas. The answer, which was unverified, consisted of a general denial. Plaintiff's motion for judgment on the pleadings was granted. Afterward, on the 25th day of April, 1904, and at the same term of court at which the judgment was rendered, defendant filed a motion to set aside and vacate the judgment upon the grounds: (1) That the district court of Finney county was without jurisdiction of the parties and the subject-matter, because the American Steel and Wire Company, a foreign corporation, was without authority of law to transact or do business within the state of Kansas under the provisions of article 3 of chapter 23, General Statutes of 1901; (2) because the answer put in issue the fact that the corporation had been granted authority to do business within the state; and (3) because defendant had been misled by the allegation of the petition to the effect that the corporation had been granted authority and was legally doing business within the state, when in fact no such authority had been granted or applied for by the corporation. The court denied the motion to vacate the judgment, and defendant brings the case here for review.

The only question to be determined is whether the answer raised an issue as to the authority of the corporation to carry on business within the state. In the case of *Northrup v. Wills*, 65 Kan. 769, 70 Pac. 879, the petition alleged that plaintiff was "a corporation duly chartered, organized and existing under and by virtue of the laws of the state of Texas," and was silent with respect to any authority to do business in

Hatch v. Geiser.

Kansas. It was held that a demurrer to the petition was properly overruled, and further that, for the reason that the statements filed and acts performed by a corporation necessary to entitle it lawfully to engage in business are made and kept of record in a public office, the burden of proving that the requisites have not been complied with rests upon the party asserting the negative. In *Jordan v. Telegraph Co.*, 69 Kan. 140, 143, 76 Pac. 397, it was said:

"The petition discloses that the plaintiff was a foreign corporation, but does not disclose that it had not complied with the requirements of the chapter cited. This was defensive matter, and to be availed of should have been pleaded."

By pleading a general denial defendant admitted plaintiff's capacity to maintain the action. The rule is that if the want of capacity to sue appear upon the face of the petition a demurrer will lie; otherwise, the defect must be specially pleaded or it is waived. (1 Encyc. Pl. & Pr. 10; Code, § 91; Gen. Stat. 1901, § 4525.) The judgment is affirmed.

All the Justices concurring.

S. S. HATCH *et al.* v. WILLIAM GEISER.

No. 14,471. (84 Pac. 555.)

SYLLABUS BY THE COURT.

PRACTICE, SUPREME COURT—*Briefs*. A compliance with rule 10 of this court is necessary to the proper consideration of many questions presented for decision, and cases may be affirmed where this rule is not followed.

Error from Chautauqua district court; GRANVILLE P. AIKMAN, judge. Opinion filed February 10, 1906. Affirmed.

Brooks & Spencer, for plaintiffs in error.

H. E. Sadler, for defendant in error.

6—73 KAN.

73 81
82 658

The opinion of the court was delivered by

GRAVES, J.: This is a case brought to exclude the defendant from all right under a certain oil-and-gas lease made by the plaintiffs. After the petition, answer and reply were filed and the case came on for trial the attorney for plaintiffs stated the case to the court; whereupon the defendant moved for judgment on the pleadings and statement of counsel, for the reason that, all taken together and conceded to be true, no cause of action had been shown against the defendant. This motion was allowed. The plaintiffs excepted, and now assign that ruling as error.

To ascertain whether or not this ruling was correct necessitates a careful examination of the lease, which is attached to the petition, an examination of the averments in the petition, and of the opening statement of counsel. There is nothing whatever in the brief of the plaintiffs in error concerning these important matters, except a reference to the page of the record where they may be found. There is but one record, and it is impractical for each member of the court to make such examination thereof as is necessary for the determination of the question presented. To provide for such cases, so each member of the court can examine with care the papers and statements involved, rule 10 of this court was adopted years ago, and has been printed in and distributed with the dockets every month since. Every lawyer must be familiar with it. The rule reads:

"The brief for plaintiff in error or appellant shall be printed, and shall contain: (1) A full statement of the essential facts of the case; (2) a specification of the errors complained of, separately set forth and numbered; (3) the argument and authorities in support of each point relied on, in the same order, with pertinent references to the pages of the record. When the error alleged relates to the admission or rejection of evidence, the brief shall quote the full substance of

Hurd v. Railway Co.

the evidence admitted or rejected. When the error alleged relates to instructions given or refused by the court or to a ruling on the sufficiency of the petition or other pleading, or of an affidavit or the construction or effect of a contract or any document, order, entry, or paper, the instructions given or refused, the pleading, contract, document, order, entry or paper shall be set out in full. The brief of the appellee or defendant in error shall also be printed, and contain: (1) Any points made challenging the sufficiency of the record, or the plaintiff in error's right to be heard; (2) a full statement of any additional facts shown by the record and deemed essential, with pertinent references to the pages thereof; (3) citations of authorities and discussions of alleged errors, in the same order as in plaintiff in error's brief."

To disregard this rule, in a case where the necessity for a compliance therewith is so apparent, seems inexcusable. We very much regret summarily to dispose of cases for reasons of this kind, but it is important both to the court and litigants that this rule be enforced, and we feel that this necessity justifies such disposition. The judgment of the district court is affirmed.

All the Justices concurring.

M. J. HURD V. THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY *et al.*

No. 14,472. (84 Pac. 553.)

SYLLABUS BY THE COURT.

1. JURISDICTION—*District Judge—Dissolution of a Restraining Order.* A district judge at chambers has power to dissolve a restraining order granted by a probate judge under the provisions of section 239 of the civil code. (Gen. Stat. 1901, § 4686.)
2. RAILROADS—*Appropriation of Land—Temporary Injunction.* A showing by the plaintiff that a railway company, which was taking steps toward the building of a switch for a public

Hurd v. Railway Co.

use in a city, had made a survey across plaintiff's ground, and that if the switch were built it would greatly injure plaintiff, did not require the allowance of a temporary injunction by the district judge, since it did not appear that the railway company intended to take possession of or to appropriate the ground illegally, or otherwise than by purchase or condemnation.

3. INJUNCTION—*Apprehension or Possibility of Injury Will Not Warrant It.* Mere apprehension or a possibility of wrong and injury by a defendant is ordinarily not enough to warrant the granting of an injunction, but there should be at least a probability of wrongful action and irreparable injury before a court is required to enjoin the action.

Error from Harper district court; PRESTON B. GILLET, judge. Opinion filed February 10, 1906. Affirmed.

E. C. Wilcox, for plaintiff in error.

William R. Smith, O. J. Wood, Fred Washbon, and T. A. Noftzger, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: M. J. Hurd, who owns real property in the city of Anthony, brought this suit against the Atchison, Topeka & Santa Fe Railway Company, the Kansas Southwestern Railway Company, the Anthony Wholesale Grocery Company and the city of Anthony to enjoin the construction of a switch across certain lots belonging to plaintiff, over a street and up an alley to the place of business of the Anthony Wholesale Grocery Company. It was alleged that the railway companies were cooperating in building the proposed switch, and that it was being done for the accommodation of the Anthony Wholesale Grocery Company, and for a purely private purpose. There were also allegations that a track built as proposed would greatly injure the plaintiff, and that the injury would be one for which there was no good measure of damages. A temporary restraining order

Hurd v. Railway Co.

was allowed by the probate judge, and upon notice the matter of dissolving the order was brought before the judge of the district court, at chambers. The question was submitted upon some agreed facts, and also upon testimony, with the result that the district judge dissolved the temporary restraining order. Application was then made to the district judge to grant a temporary injunction, and the testimony and facts used on the first hearing were submitted on this application, but the judge found them to be insufficient and denied the temporary injunction.

It is first insisted that there was no power in the district judge at chambers to dissolve the restraining order granted by the probate judge. The argument is that prior to the amendment of 1901 section 239 of the civil code (Gen. Stat. 1889, § 4334) authorized probate judges to grant temporary injunctions, but that under the amendment only restraining orders may be issued by them, and that while there is express authority given to district judges to dissolve temporary injunctions the power to dissolve temporary restraining orders is not given. (Gen. Stat. 1901, § 4686.) In the amended section it is provided that the restraining order granted by the probate judge shall be of the same effect as a like order made by the district judge, and district judges have always exercised the power of setting aside their own restraining orders, as well as those granted by probate judges. Besides, the act concerning district courts provides that the judges at chambers and in vacation shall have power not only to vacate and modify injunctions but also to vacate all necessary interlocutory orders. (Gen. Stat. 1901, § 1924.) A temporary injunction and a temporary restraining order are each designed to afford temporary injunctive relief of the same general character, and if the power to vacate a temporary injunction is not of itself sufficient to vacate a temporary restraining order the language of the statute giving district judges

the power to vacate interlocutory orders is certainly sufficient authority for that purpose. It might be added that in the restraining order in question it was specifically prescribed that it should only be effective until a hearing before the district court or a judge thereof. If the facts in the case justified the action of the district judge, there was no lack of power to make the order of dissolution.

It is contended, however, that under the facts the district judge was not warranted in either vacating the restraining order or refusing the temporary injunction. The judge found, and not without testimony, that the switch proposed to be built was for a public use, and was intended to be available to business houses along the line as well as to that of the Anthony Wholesale Grocery Company. Being a public railroad, it follows that private property necessary for a right of way might be taken under the power of eminent domain. The fact that the company once condemned as much land at Anthony as was then deemed necessary did not exhaust the power. It may take as much more land as its increased business and the public convenience may require. (*C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co.*, 26 Kan. 669.) Prior to the selection of a route the company had a right to enter upon plaintiff's ground to make examinations and surveys with a view of selecting the most advantageous route. (Gen. Stat. 1901, § 1316, subdiv. 1.)

It appears that representatives of the railway companies had made an examination in an endeavor to select a route for the switch, and a blue-print of a survey across the corner of plaintiff's lots had been made. They had discussed the feasibility of this survey with the agent of the plaintiff, who suggested or inquired if the survey could not be made so as to take less of plaintiff's land, and he was told that they might be able to get along with eight feet of it. These preliminaries were not illegal, nor did they necessarily

Hurd v. Railway Co.

indicate that the plaintiff's rights had been, or would be, invaded. From what was disclosed the plaintiff might well apprehend that the switch would soon be built, but we discover nothing showing an intention illegally to appropriate plaintiff's land for that purpose. It was not enough to allege and show that an appropriation of a right of way over plaintiff's ground was contemplated, but it should further appear that there was a purpose to take wrongful possession of it. The defendants had no right to take possession of plaintiff's ground, nor to begin construction of the switch over it, without acquiring the right to do so by purchase or condemnation; but the trial judge could not assume that the defendants would violate the law or the rights of the plaintiff. If a presumption were to be indulged it would be that of rightful action, and that the land would be taken by condemnation if it could not be obtained by negotiation and purchase. The survey of the railway company was a legal step necessary to a condemnation proceeding, and it appears that on the day following the meeting with plaintiff's agent and the negotiations had with him, and before there was any attempt to construct the switch, this suit was brought. In the granting or continuance of a preliminary injunction the judge is vested with considerable discretion, and in this case the showing of a threatened invasion of plaintiff's rights was so weak that it cannot be said that the refusal of the judge was an abuse of discretion. Mere apprehension or possibility of wrong and injury by a defendant is ordinarily not enough to warrant an injunction. There must be at least a reasonable probability of wrongful action and irreparable injury before a court will interfere and grant an injunction. It cannot be said that an intention wrongfully to appropriate plaintiff's property or construct defendants' track over her land without obtaining a right to do so by negotiation or under the power

Hall v. Davidson.

of eminent domain was shown to be a reasonable probability.

No grounds for an injunction were shown as against either the city or the grocery company.

There appears to be no just cause to complain that the judge considered and determined the merits of the case on these motions. To determine whether plaintiff was entitled to a preliminary injunction matters were necessarily considered which would be involved in a final consideration of the case. The order made, however, is not a finality, and does not preclude the granting of such relief as the plaintiff may be entitled according to the evidence presented on the final trial. The order of the district judge is affirmed.

All the Justices concurring.

EZRA D. HALL *et ux.* V. WILLIAM M. DAVIDSON *et al.*
No. 14,473. (84 Pac. 556.)

SYLLABUS BY THE COURT.

EJECTMENT AND PARTITION — *Statement by Counsel* — *Withdrawal of Defense of Ownership from the Jury.* It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw such cause or defense from the jury. *Held*, in this case, that the statement and admissions of the plaintiffs in error did not as a matter of law preclude them from recovering upon their defense of ownership.

Error from Cherokee district court; WILLIAM B. GLASSE, judge. Opinion filed February 10, 1906. Reversed.

Tracewell & Moore, and *Skidmore & Walker*, for plaintiffs in error.

C. A. McNeill, and *C. D. Ashley*, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: William J. Hall died testate, having devised his property in equal proportions to his children, Ezra D. Hall, George Hall, William H. Hall, Benjamin Hall, and Griffith Hall, and his grandson, William M. Davidson, who was the only child of Sarah J. Davidson, a daughter of the testator who died before the will was executed. The grandson, William M. Davidson, who was the plaintiff in this case, had prior to the suit purchased the one-sixth interest of Griffith Hall, and thus claimed to be the owner of one-third of the property. At the time of his death William J. Hall held the legal title to the north one-half of the southwest quarter of section 16, in township 34 south, of range 24 east of the sixth principal meridian, in Cherokee county, Kansas. Davidson began suit in partition against all of the defendants except Ezra Hall and his wife, and as to them his suit was ejectment, partition, and for rents and profits. For the purpose of deciding the question presented by this proceeding it may be said that all of the defendants except Ezra D. Hall and his wife, Sarah, admitted the allegations of the petition and joined with the plaintiff in his prayer for relief. Ezra D. Hall, in his cross-answer, denied all the allegations of the cross-petitions of the other defendants, and in his answer to the plaintiff's petition stated:

"That on July 21, 1884, William J. Hall, in consideration of love and affection, transferred and conveyed to this defendant, by parol gift, the real estate above described; that this defendant then and there, under and by virtue of said gift, and with the knowledge and consent of said William J. Hall, took possession of said premises, and continued to hold the open, notorious and exclusive possession thereof, without any adverse claims thereto, for more than fifteen years, to wit, until March 28, 1900, when he, by warranty deed, transferred and conveyed said real estate to Sarah Hall; that during said fifteen years and more

of possession and occupancy of said premises, by this defendant, as aforesaid, this defendant made valuable, permanent and lasting improvements on said premises, and paid the taxes thereon; and during all of said occupancy of said premises this defendant was the owner in fee simple of said real estate, and the said William J. Hall during said time had no right, title or interest in and to said land, nor the right to possession thereof."

Sarah Hall in her answer restated the facts substantially as they were recited in the answer of her husband. The facts stated in the answers and cross-answers were put in issue by proper pleadings by all of the other parties. After a jury had been impaneled to try the issues of fact the parties made the following admissions:

"It is admitted by the parties to this action that William J. Hall, deceased, became the owner of the land in controversy, to wit, the north half of the southwest quarter of section 16, township 34, range 24, in Cherokee county, Kansas, on the 21st day of July, 1884, and that the records in the office of register of deeds of Cherokee county, Kansas, show the title in said real estate to be in William J. Hall, deceased, from said July 21, 1884, until the time of his death, which was on April 29, 1900, except during the time that James H. Boyce held a tax deed on said real estate, from September 12, 1894, until January 24, 1895, when he conveyed the same to William J. Hall by a quitclaim deed."

The court then said:

"In addition to the facts agreed on by the attorneys in this case the court states further that in the statement of this case to the jury by Mr. Tracewell it was stated that Ezra D. Hall consulted with John N. Ritter, who was a former member of this bar, but is now deceased, and who advised him to procure Mr. Boyce to make a deed of the premises to his father instead of to him; and he got Mr. Boyce to make a deed to his father, William J. Hall.

"And now the court upon the admitted facts in the statement just recorded holds that prior to and at the time of his death the legal title to the land in contro-

Hall v. Davidson.

versy was in William J. Hall, and that the ownership thereafter went to his heirs by the force and effect of his will, and denies to the defendants the right to submit to the jury the question as to whether William J. Hall gave to the said Ezra D. Hall the lands in question in 1884, or at any time thereafter prior to the execution of the deed from Mr. Boyce to William J. Hall, and holds the only questions there are here for trial to be the question of rents and profits, as stated in the second count of plaintiff's petition, and the action of partition, as stated in the third count of plaintiff's petition; and the matter of partition is for the court to try, and will be tried by the court."

Upon the issues remaining a judgment was rendered against the plaintiffs in error as in ejectment, partition, and for rents and profits.

Complaint is made that the court erred in withdrawing from the consideration of the jury, and in refusing to try, the issue of ownership presented by the answers and cross-answers of the plaintiffs in error. The plaintiffs in error pleaded in their answers and cross-answers that they had paid all of the taxes from the time they had gone into possession. The statement of their counsel that during that period the land had been sold and deeded for taxes, and the plaintiffs in error had redeemed, and by the advice of their lawyers had got the holder of the tax deed to quitclaim to William J. Hall, who was still the holder of the legal title, would not as a matter of law preclude them from establishing their defense of ownership. Redemption under the circumstances was equivalent to a payment of the taxes, and nothing more. The court could not therefore say, as a matter of law, that paying the tax-deed holder the amount necessary to redeem the land and directing him to quitclaim to William J. Hall were conclusive that Ezra Hall was not the owner of the land. Therefore the judgment is reversed, and the cause remanded.

All the Justices concurring.

WILLIAM MARTINDALE V. R. T. BATTEY *et al.*

No. 14,476. (84 Pac. 527.)

SYLLABUS BY THE COURT.

1. **JUDGMENT** — *On the Sustaining of a Demurrer — Final Determination.* A judgment for the defendant upon the sustaining of a demurrer to a petition is a final determination of the action, and until such judgment is set aside no further proceedings can be had therein looking to a trial of the issues between the parties.
2. ——— *Power to Set Aside.* After the expiration of the term at which a judgment is rendered the court has no power to set it aside because of its being based on an erroneous ruling.
3. **PRACTICE, DISTRICT COURT** — *Amendment of the Record.* Where a demurrer which attacks a petition upon several grounds is sustained upon one of them, and a judgment for defendant is thereupon rendered, but the record then made shows only that the demurrer was sustained, without indicating upon what ground, the court may at a subsequent term cause the record to be amended so as to state upon what ground the demurrer was sustained, provided the fact be established by clear and satisfactory proof, which need not, however, be founded upon any record, memorandum or other writing.
4. ——— *Separate Petitions Not to be Filed after Final Judgment on Sustaining Demurrer for Misjoinder.* A demurrer was filed to a petition on several grounds, including misjoinder and want of facts, and a record was made showing that the demurrer was sustained but not indicating upon what ground; a judgment for defendant was rendered which was affirmed by this court for the reason that the petition contained two causes of action which were improperly joined; at a subsequent term of the district court the plaintiff asked that the record be amended to show that the demurrer was in fact sustained upon the sole ground that the petition failed to state facts sufficient to constitute a cause of action, and also that he be permitted to file separate petitions and proceed with the prosecution of the two causes. *Held*, that while the plaintiff was entitled to have the record amended so as to show the fact in regard to the ruling actually made, the court had no power to permit the filing of separate petitions.

Martindale v. Battey.

Error from Shawnee district court; ALSTON W. DANA, judge. Opinion filed February 10, 1906. Modified.

Rossington & Smith, J. S. West, and Garver & Larimer, for plaintiff in error, and cross-petitioner in error George C. Rankin, receiver.

Frank Doster, Ferry & Doran, and Gleed, Ware & Gleed, for defendants in error Battey, Lambert, and Hood.

The opinion of the court was delivered by

MASON, J.: William Martindale brought an action against several defendants, who demurred to the petition as finally amended, the demurrer being based upon several grounds, including the misjoinder of causes of action and the failure to state facts sufficient to constitute a cause of action. The court sustained the demurrer and rendered final judgment for the defendants. The record then made of these proceedings merely showed that the demurrer was sustained, without indicating upon what ground that ruling was based. The plaintiff prosecuted error to this court, where it was held that two causes of action were improperly joined in the amended petition against which the demurrer was directed, and that therefore no error appeared, and the judgment of the district court was accordingly affirmed. (*Benson v. Battey*, 70 Kan. 288, 78 Pac. 844.)

Thereafter the plaintiff represented to the district court that the ruling sustaining the demurrer had been made upon the ground that the amended petition failed to state facts sufficient to constitute a cause of action, and not upon the ground that two causes of action were improperly joined, and that the court had so announced at the time the decision was made, although the journal entry was silent on the subject. He therefore asked that the record be amended to show the full facts regarding the ruling, and that thereupon he

should be permitted to file separate petitions setting out his several causes of action, and to proceed without further service, in accordance with the practice where a demurrer is sustained upon the ground of misjoinder. (Gen. Stat. 1901, § 4526.) The court denied both applications, and the plaintiff again prosecutes error.

As the important relief sought by plaintiff in error is that he be allowed to keep his action in court by the filing of separate petitions, and the request for the amendment to the record is only incidental to this, we shall for the purpose of considering the situation which would then be presented assume for the present that he was entitled to have the journal entry corrected so as to show what had really taken place, and treat the case as though the district court had actually permitted the record to be amended. The question so presented is this: Could the court then by any order it had jurisdiction to make allow the filing of separate petitions, and proceed with the trial of the cause or causes? The plaintiff in error contends that this question should be answered in the affirmative. In support of this view it is argued with much plausibility that as the district court based its decision upon the ground that no cause of action whatever was stated in the amended petition, and the supreme court held on the contrary that two complete causes were stated, the plaintiff never by any possibility could have had an opportunity to exercise his statutory right of filing separate petitions until after the affirmance of the judgment, and that if it must be held that it was then too late for such action on his part the practical effect of the ruling is to deny him the benefit of the statute altogether.

Notwithstanding the obvious hardship that results we must hold that the district court rightly decided that it had no power to proceed further in the case, for the reason that a final judgment had been rendered. So long as this judgment stood it was an abso-

Martindale v. Battey.

lute bar to any further proceedings in the nature of a trial of the issues between the parties, and as the term at which it had been rendered had expired it could only be vacated in accordance with some procedure pointed out by the code. (*Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224.) No question is here involved as to the effect of the judgment as an adjudication if pleaded in any subsequent action between the parties, but so far as concerned that particular action the judgment rendered for the defendants was a finality, unless it should be set aside for some sufficient reason in a manner provided by law.

It is to be observed that what this court decided at the previous hearing in this case (and the only thing it could have decided) was not that the ruling of the trial court in sustaining the demurrer was necessarily correct, but that it could not be said from the record presented here that the ruling was erroneous. The judgment sought to be reversed was based upon an order sustaining a demurrer which included several grounds, and the case-made did not disclose upon which of these grounds the district court in fact acted. This situation compelled an affirmance of the judgment if any one of the grounds set out in the demurrer was well founded. (*New v. Smith*, 68 Kan. 807, 74 Pac. 610.) It now appears, from the showing made by the plaintiff upon his application for an order amending the journal entry, that the district court in fact erred in sustaining the demurrer, since it did so upon a ground which this court has held to be untenable. The judgment founded upon this ruling was therefore erroneous. But it was not on that account void. The error could be taken advantage of only by proceedings in the supreme court. If not challenged by this method it became final, and was as binding upon the parties as any other judgment could be. For all practical purposes it was not so challenged. While the defeated party filed a petition in error in this court, he omitted to incorporate in the case-made which he

brought here a showing of the error that was in fact committed, and his appeal was consequently ineffectual. The plaintiff, having failed to have the error corrected in the way provided by the statute, is beyond the relief of the district court or any other tribunal. The district court has no power to set aside its own judgment at a term subsequent to that at which it was rendered merely because it is shown that it was based upon an erroneous ruling.

Considering the record as having been amended in accordance with plaintiff's request, this situation is presented: The demurrer to the petition has not been sustained on the ground of misjoinder, but the ruling of the district court sustaining the demurrer has been affirmed by this court for the reason that the petition was held to be in fact defective on that ground, and because, so far as could then be learned from the record, the ruling complained of might have been based upon that consideration. Inasmuch as the demurrer has not been sustained for misjoinder no occasion has arisen for applying the statute permitting the filing of separate petitions in such a case. To have the effect desired by the plaintiff the amendment would have to be treated as though it had been properly incorporated in the record accompanying the first petition in error, and as though this court, as it must then have done, had reversed the judgment of the district court for error in holding that the petition failed to state facts sufficient to constitute a cause of action, but had directed that the demurrer be sustained for misjoinder of causes of action. Under such circumstances the plaintiff, upon the mandate's being complied with, would of course have the opportunity to proceed further by filing separate petitions. It is not possible, however, to give to the amendment any such far-reaching effect, or to permit it upon any theory of relation to change the character of the order which was actually made in the determination of the first pro-

ceeding in error, and which left the judgment of the district court undisturbed.

The judgment of the district court was not, as is assumed by counsel for plaintiff in error, a judgment declaring that the petition contained two causes of action which did not admit of being prosecuted together. This declaration, if the demurrer had been sustained on that ground, would have been involved in such ruling and would have preceded the judgment. A general judgment for the defendant necessarily follows the sustaining of a demurrer to a petition, whatever may be the ground, where no request is made for leave to amend or to file separate petitions. The judgment in this instance was expressed to be "that neither said plaintiff nor said defendants nor any of them recover of and from said defendants Calvin Hood, I. E. Lambert, or R. T. Battey, or either of them, and that the said defendants [naming them] are entitled to their costs in this action, taxed at \$—, for which judgment is hereby rendered." This was equivalent to the formula that the plaintiff take nothing by his action, or that the defendants go hence without day. It was a final determination of the cause against the plaintiff. (1 Black, Judg. §§ 13, 29.) It was entered as it was made, and neither the substance nor the record of it is now subject to amendment.

These considerations doubtless dispose of the substantial controversy involved in this proceeding. But as the plaintiff assigns as error the action of the district court in refusing to permit the record to be amended so as to show the ground upon which the demurrer was sustained, it is perhaps necessary to decide the question so raised. It is a general rule that the record of a judgment may be corrected so as to speak the truth, even after the expiration of the term at which it was rendered. (17 Encyc. Pl. & Pr. 920.) There are cases holding that this should be done only when some record or memorandum has been

preserved which may serve as the basis of such amendment, but there are also decisions to the contrary. (17 Encyc. Pl. & Pr. 931.) The question presented upon an application for an amendment to the record is one of fact. The change should be allowed only where the proof in support of the application is clear and convincing. But where it is satisfactorily established that the requisite facts exist we think relief should not be denied merely because the evidence rests entirely in parol.

No reason is perceived why the amendment asked for in this case might not be permitted. The original record was correct so far as it went, but it failed to show fully what the action of the court had been. It is not apparent that any benefit can now result to the plaintiff by making the recital more specific, yet it would seem to be the right of either party to have the journal show just what ruling was in fact made. The case is not one of an amendment being asked in order that the record might show the reasons that actuated the judge in reaching a decision. The proposed addition to the record is designed to show what in fact was decided. A demurrer which presents various grounds of objection to a petition partakes of the nature of several separate pleadings, and a ruling sustaining it upon one ground and overruling it upon others is tantamount to a ruling upon each of a number of different motions. A statement that such a demurrer is sustained does not tell the whole story. If for any reason the plaintiff prefers that the recital of the acts of the court upon the journal shall be completed we think he has the right to an order to that effect. We do not understand that there is any dispute as to what actually took place at the time the demurrer was ruled upon, or that it is seriously questioned that the evidence offered by the plaintiff was sufficient to establish his claim in that regard.

The order will therefore be that the rulings of the

trial court are affirmed, except as to the refusal to permit the amendment of the record. As to this feature of the case the cause is remanded, with directions to permit such amendment.

All the Justices concurring.

GRAVES, J., not sitting.

ARLIE E. BOWERSOX *et al.* v. J. W. HALL & Co., a
Partnership.

No. 14,480. (84 Pac. 557.)

SYLLABUS BY THE COURT.

1. PETITION—*General Demurrer—Liberal Construction.* When a general demurrer is filed to a petition, and no motion to make it more definite and certain is offered, the petition should be liberally construed, with a view to promote justice, and the demurrer overruled if the facts stated, when all are taken as true, constitute a cause of action, whether well pleaded or not.
2. CONTRACTS—*Forfeiture—Recovery of Money from Agent.* The petition in this case examined and found sufficient.

Error from Republic district court; HUGH ALEXANDER, judge. Opinion filed February 10, 1906. Reversed.

John C. Hogin, for plaintiffs in error.

Hugh Alexander, for defendants in error.

The opinion of the court was delivered by

GRAVES, J.: The defendants are real-estate brokers, and reside at Belleville, Kan. The plaintiffs own real estate in Republic county. They employed defendants to sell their land, agreeing to pay them \$100 if they would make the sale as stipulated in the contract.

Defendants found a buyer, with whom they entered

73	99
74	19
74	76
73	99
76	705
77	775

into a written contract of sale materially different from the one authorized by the plaintiffs, but the contract was made subject to the plaintiffs' approval. The buyer paid \$100 cash on the contract, which sum was to be returned if the sale was not approved by the plaintiffs, and to be forfeited if the conditions of the contract were complied with on the part of the owners of the land and the buyer failed to carry out the stipulations on his part. Afterward plaintiffs claimed that the \$100 had become forfeited, and demanded payment thereof from Hall & Co., who refused, and this action was brought to recover that sum.

A general demurrer was sustained to the plaintiffs' petition, which ruling is assigned as error in this court. The petition, so far as necessary to show the question raised by the demurrer, reads as follows:

"That on the 22d day of August, 1902, . . . the plaintiffs . . . entered into a contract in writing with the said J. W. Hall & Co. to sell the farm of the said plaintiffs. The said contract is as follows: [This contract, being immaterial, is omitted.] . . .

"Plaintiffs state that thereafter, the exact date they are unable to give, the said defendants, J. W. Hall & Co., entered into a contract to sell the land heretofore described, which contract is as follows:

"Received of George W. Hart, town of Colfax, county of Jasper, state of Iowa, one hundred dollars, the same being a part of the purchase-money on the following-described real estate, situated in the county of Republic and state of Kansas, to wit: S. 2 of S. W. 4 and N. E. 4 of S. W. 4 and S. 2 of N. W. 4 of S. W. 4 of sec. 22, T. 1, R. 2.

"Contract price for same being \$3700. Balance of purchase-money payable as follows, to wit: First, on the 10th day of February, 1903, \$1750. Second, balance is to be a mortgage covering this land at six per cent. . . .

"An abstract to be furnished, showing title as represented—that is, clear of all encumbrances, and no clouds on the title; also a good and sufficient warranty deed to be given upon the above terms being complied with—that is,

"Providing, however, in case title is not as above

Bowersox v. Hall.

represented, the part purchase-money here paid shall be refunded to said George W. Hart; but in case title is as represented, and said George W. Hart fails to comply with the terms as above stated, then the money here paid shall be forfeited, and this contract shall be null and void; in case title is not good or of any failure of Bowersox to accept this contract, it is understood that J. W. Hall & Co. will not be held responsible for any damages.

_____, *Owner.*

By J. W. HALL & Co., *Agents.*

“The above sale, price and terms approved, and I hereby agree and bind myself to carry out my part of the same.

GEORGE W. HART.”

“Plaintiffs say that after the execution of the above contract, but the exact date plaintiffs cannot give, they were notified by J. W. Hall & Co. of the execution of the above contract with said George W. Hart, and at the request of J. W. Hall & Co. the plaintiffs executed a warranty deed to the said George W. Hart for the premises described in said contract, to wit: The south half of the southwest quarter, the northeast quarter of the southwest quarter and the south half of the northwest quarter of the southwest quarter of section twenty-two (22), in township one (1) south, of range two (2) west of the sixth principal meridian, in Republic county, Kansas, free and clear of all encumbrances, and deposited the same, together with an abstract of title to said land, with the said J. W. Hall & Co.

“Plaintiffs say that no part of the contract entered into for them, by the defendants, J. W. Hall & Co., with the said George W. Hart, has been carried out; that no payments thereon were ever made by said George W. Hart, or any one for him, other than the one hundred dollars preliminary payment mentioned in said contract; and that the said contract by its terms is null and void.

“Plaintiffs further say that no part of the one hundred dollars paid by George W. Hart to J. W. Hall & Co. on the contract above set forth has ever been paid to them; that they have made repeated demands upon the said J. W. Hall & Co. for the said sum of one hundred dollars; that the same is now due and unpaid and has been due them from defendants, J. W. Hall & Co., from and since the 10th day of February, A. D. 1903.

“Wherefore, plaintiffs pray judgment against the

defendants, J. W. Hall & Co., for the sum of one hundred dollars, with interest thereon from the 10th day of February, A. D. 1903, at the rate of six per cent. per annum, and for the costs of this suit, and for such other and further relief as shall seem just and equitable to the court."

It is claimed that this petition does not show that plaintiffs complied with the requirements of the contract made for them by Hall & Co., in that it fails to allege that they furnished an abstract showing the title clear of all encumbrances, and no clouds thereon. There are other objections made to the petition, but we think this the most important and meritorious. Upon this subject the petition avers that plaintiffs, when informed by Hall & Co. of the transaction with George W. Hart, executed a warranty deed to the latter for the land, free and clear of all encumbrances, and deposited it and an abstract of title with Hall & Co. This is a weak statement, but under the liberal rule of construction that applies in favor of the pleader, as against a general demurrer, where no motion to make definite and certain has been filed, we deem it sufficient.

It is claimed that the agents, Hall & Co., have a lien on the fund for services rendered. If they have their rights in that respect should be presented in an answer. The contract fixing their fee at \$100 was not complied with, and the amount to which they are entitled for what they have done is a reasonable sum, which might furnish a question for litigation. This is likewise true of the question whether or not the acts of Hart are sufficient to amount to a forfeiture. If not, the facts might be a good defense.

In overruling the demurrer we only decide that the averments of the petition, when considered in their broadest sense, state a cause of action. (*The Western Massachusetts Insurance Company v. Duffey*, 2 Kan. 347; *Stewart v. Balderston*, 10 Kan. 131, 147;

Crowther v. Elliott, 7 Kan. 235; *Park v. Tinkham*, 9 Kan. 615.)

The judgment of the district court is reversed, and the court directed to overrule the demurrer and proceed with the case.

JOHNSTON, C. J., GREENE, MASON, PORTER, JJ., concurring.

BURCH, J. (dissenting): I think the district court was correct in sustaining a demurrer to the plaintiffs' petition, and I do not think that weakness or indefiniteness of statement at all characterizes the pleading, as my very indulgent and charitable brethren say. The allegation referred to describes in sufficiently clear and vigorous phrase the deed which was executed and deposited, but nothing else. It simply uses the common expression, "warranty deed, . . . free and clear of all encumbrances," interpolating between the first two words and those that follow the name of the grantee and the description of the land.

In addition to the deed being a warranty deed it was necessary that it be "good and sufficient." A glance at the judicial interpretations of these words in volume 4 of *Words and Phrases Judicially Defined*, page 3109, will reveal their materiality. There is no allegation that the land was free and clear of all encumbrances, and there is no allegation that there were no clouds on the title. There is no allegation that the abstract deposited showed a title clear of all encumbrances and clouds. The contract contained a specific engagement that such an abstract would be furnished, and until that was done no right of recovery accrued to the plaintiffs.

The board of law examiners will be surprised and grieved to find the petition in this case printed in the reports of the decisions of this court as an approved precedent.

Mr. Justice SMITH authorizes me to say that he joins in this dissent.

S. C. HOLMES v. J. L. WAYMIRE *et al.*

No. 14,481. (84 Pac. 558.)

SYLLABUS BY THE COURT.

ATTORNEYS—*Lien for Fees—Extent of Statutory Provision.*

Under the statute an attorney may acquire a lien for his compensation upon money due his client from the adverse party in any action or proceeding in which the attorney is employed, but such lien does not extend to land which is the subject-matter of the litigation.

Error from Woodson district court; OSCAR FOUST, judge. Opinion filed February 10, 1906. Affirmed.

S. C. Holmes, pro se.

A. F. Florence, and G. R. Stephenson, for defendants in error, except J. L. Waymire.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was a suit to enforce an attorney's lien. J. L. Waymire brought suit against Ira Summerfield for the specific performance of a contract for the sale and conveyance of land, and he employed S. C. Holmes as an attorney to prosecute the same. Shortly after the commencement of the suit Holmes served on Summerfield a notice of an attorney's lien on the land in controversy for his fee in the case, which he fixed at \$150. Subsequently, and before a trial was had, Waymire and Summerfield compromised their differences and caused the suit to be dismissed without consultation with, or the consent of, Holmes. The latter then brought this suit against Waymire and Summerfield, and he also named as defendants A. F. Florence, an attorney for Summerfield, and a party to whom the land had been sold, in which he asked for the recovery of \$150 against Waymire, and that his attorney's lien be foreclosed and declared a first lien on the land which was the subject of the controversy. in the suit for specific performance.

Holmes v. Waymire.

Upon the testimony in behalf of Holmes the court gave him judgment against Waymire for \$150, but determined that he had not acquired an attorney's lien on the land in question.

The plaintiff's right to a lien is determinable under section 395 of the General Statutes of 1901, which has been amended as to notice since the decision was made by the district court. (Laws 1905, ch. 68.) The section provided:

"An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and upon money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party."

This section is a substitute for, and may be said to be a substantial enactment of, the common law upon the subject of attorneys' liens. It provides, first, for a possessory lien upon any papers of his client which have come into the attorney's hands in the course of his employment, and also upon any money in his hands belonging to his client. The second provision, which is sometimes called a charging lien, attaches to any money due to his client and in the hands of the adverse party in an action or proceeding in which the attorney is employed, providing the statutory notice has been given.

The plaintiff insists that the lien claimed by him falls within the second class, and that it attached to the land which was the subject of controversy. The lien is special in its character, and, being statutory, can only attach to the things and upon the conditions prescribed by the statute. As will be observed, the attorney's lien prescribed is not given upon the subject-matter of the action, but is restricted to money due the client and in the hands of the adverse party. Even under the common law an attorney who com-

Holmes v. Waymire.

menced a suit did not acquire a lien on the subject of action, nor was he allowed a lien on real estate where it was the thing in dispute. (*Humphrey et al. v. Browning et al.*, 46 Ill. 476, 95 Am. Dec. 446; *Martin v. Harrington*, 57 Miss. 208; *McCullough v. Flournoy*, 69 Ala. 189; *Higley v. White et al.*, 102 Ala. 604, 15 South. 141; *Hanger and wife et al. v. Fowler*, 20 Ark. 667; *Rowe, Executor, &c., v. Fogel, &c.*, 88 Ky. 105, 10 S.W. 426, 2 L. R. A. 708; *Keehn v. Keehn*, 115 Iowa, 467, 88 N. W. 957; *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. 973; 3 A. & E. Encycl. of L. 461.)

It is true, as is contended, that a judgment determining the amount of money due is not essential to the existence of a charging lien, and also that a collusive settlement and dismissal of a suit will not operate to defraud an attorney of his fee. Under the statute the lien is not upon a judgment, but is upon "money due." In *K. P. Rly. Co. v. Thacher*, 17 Kan. 92, the court, in speaking of the statute, said:

"It does not specify for what the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending in which money is due, the attorney may establish his lien. And in an action the verdict and judgment do not create the liability, do not make the 'money due.' They are simply the conclusive evidence of the amount due from the commencement of the action." (Page 101.)

But here money was not the subject of the litigation, nor can it be said that there was any money due Waymire by the adverse party at any stage of the proceeding.

In asking for a liberal interpretation of the statute plaintiff refers to *Noftzger v. Moffitt*, 63 Kan. 354, 65 Pac. 670. While that proceeding involved property, the judgment rendered provided that the successful party should recover the property or its value. The

Betterment Co. v. Reeves.

property was in fact converted into money under an order of the court, and hence there was money due the client of the claimant, and it was in the hands of the adverse party.

No reasonable interpretation of the statute can make the lien extend to the land over which the parties were contending, and hence plaintiff must look to his client alone for his compensation. This was the view of the district court, and its judgment is affirmed.

All the Justices concurring.

THE FEDERAL BETTERMENT COMPANY V. JOHN W. REEVES.

No. 14,482. (84 Pac. 560.)

SYLLABUS BY THE COURT.

1. FOREIGN CORPORATIONS—*Managing Agent—Service of Summons.* One who has exclusive supervision and control of some department of a corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons upon him will result in notice to the corporation, is a managing agent within the meaning of the statute providing for the service of summons upon a managing agent of a foreign corporation.
2. EVIDENCE—*Physician—Conclusions from Statements by a Patient.* A physician while testifying as an expert is not permitted to testify to his conclusions as to the permanency of an injury to his patient, based partially upon the history of the injury detailed to him by the patient or other person and partially upon his own examination.
3. FOREIGN CORPORATIONS—*Service of Process.* The various methods provided by statute for obtaining service of process on foreign corporations are cumulative.

Error from Neosho district court; LEANDER STILLWELL, judge. Opinion filed February 10, 1906. Reversed.

73	107
77	112
77	116

Betterment Co. v. Reeves.

Burnham & Dashiell, for plaintiff in error; *J. L. Denison*, of counsel.

W. R. Cline, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: John W. Reeves recovered judgment for injuries alleged to have been sustained by him through the negligence of the defendant, the Federal Betterment Company, a corporation. The facts alleged in the petition are, substantially, that the plaintiff was working for the Morehead Manufacturing Company in its factory, situated at Morehead, in Neosho county, Kansas; that the defendant was a corporation engaged in drilling for oil and gas and in the transportation of such products by pipe-lines to consumers; that it led a pipe from its main line into the Morehead Manufacturing Company's place of business for the purpose of supplying that company with natural gas for fuel to operate its factory; that in doing so it attached thereto what is called a "Tobey meter," but negligently failed to place any regulator between the meter and the high pressure in the main line, thus permitting the high pressure in the main line to come into the lateral line in the factory; that, through the negligent acts of the defendant in carelessly, negligently and unskillfully constructing and maintaining the pipe and meter, and in failing to place a regulator between its main pipe-line and the meter in the factory where the plaintiff was working, and in using a meter which was insufficient to restrain the high pressure of the natural gas in the main line, the pressure burst the meter, causing an explosion which hurled plaintiff the distance of a rod, knocking him senseless, or into such a dazed condition that he did not realize what had happened; that the concussion was so great as to injure his ear and hearing on the side next to the explosion, and permanently to injure his left side, shoulder, and chest; and that either by

Betterment Co. v. Reeves.

reason of the explosion of the gas upon him, or by reason of being struck on the left side of his head by some missile hurled against him by the explosion, he sustained concussion of the brain, resulting in acute mania, which lasted in a severe form for several weeks, during which time he required the constant care and attention of others. Other allegations as to the extent of plaintiff's injuries were made.

Upon the filing of this petition in the district court of Neosho county, in which county the accident occurred, a summons was issued, directed and delivered to the sheriff, upon which he made the following amended return of service:

"Received this writ May 24, 1904, and as I was unable to find the president, chairman of the board of directors or trustees, or other chief officer, or the cashier, treasurer, secretary or clerk, I served the same, as commanded therein, in my county of Neosho and state of Kansas, on the within-named defendant, the Federal Betterment Company, a corporation, as follows: On May 21, 1904, by delivering to W. Kinney, managing agent of said Federal Betterment Company, by delivering to him personally a true and certified copy of the within summons, with all the indorsements thereon.

I. F. YOCKEY, *Sheriff, Neosho County, Kansas.*

By J. T. SMITH, *Deputy* (who was specially requested to make said service)."

The defendant appeared specially and filed the following motion to quash the summons:

"Now comes the Federal Betterment Company, appearing specially and for the purpose of this motion only, and moves the court now here to quash, vacate and set aside the pretended summons and the pretended service thereof in the above-entitled action, for the following reasons, to wit:

"(1) Because there has been no service of summons upon the said Federal Betterment Company.

"(2) Because there has been no service of summons upon the said Federal Betterment Company, or any authorized agent of said company.

—

"(3) Because said action was improperly instituted in Neosho county, Kansas.

"(4) Because said pretended summons was improvidently issued.

"(5) Because said summons and the return thereof are void and of no effect, and the court has not by the issuance of such summons obtained any jurisdiction whatever over said Federal Betterment Company."

In support of the motion defendant introduced a certified copy of its charter, showing that it was incorporated under the laws of West Virginia, which charter states that the principal place of business shall be located in the city of Topeka, Shawnee county, state of Kansas; and that its chief works shall be located in the city of Cherryvale, Montgomery county, Kansas, but that it is expected and intended by the company to have branches located at other points in the state of Kansas, and also in the state of Missouri, Indian Territory, and Oklahoma territory, and at numerous other places. It also caused to be read the affidavit of F. W. Freeman, as follows:

"Affiant is the secretary and treasurer of the Federal Betterment Company; that affiant resides in the city of Topeka, county of Shawnee and state of Kansas; that the said Federal Betterment Company is a corporation duly organized and existing under and by virtue of the laws of the state of West Virginia, and that said corporation now is, and has been for about one year last past, duly authorized to transact business in the state of Kansas, and that in said last-named state said corporation has an office at the city of Topeka, and that all the chief officers of said corporation are now and have for a long time been actual residents of Shawnee county, in the state of Kansas; that said corporation has not now and never has had any office or place of business in the county of Neosho, in said state, and that none of its officers reside therein, but that affiant is informed and believes that in the above-entitled action service of summons was attempted to be made in the above-entitled action upon the said Federal Betterment Company in Neosho county, Kansas, by delivering a pretended copy of an alleged summons to one W. Kinney; but affiant avers that said W.

Kinney was not at the time of such pretended service, had never theretofore been, and is not now, an officer or agent of said company, and said W. Kinney is not now and never has been the cashier, treasurer, secretary, clerk or managing agent of said Federal Betterment Company, and is not now and never has been a person in charge of any office of said company."

It also filed the certificate of the secretary of state of the state of Kansas showing that the charter board had authorized the Federal Betterment Company to engage in the business of mining and other pursuits, as expressed in the application, in the state of Kansas, until the certificate should be revoked, or the authority canceled.

In refutation of the proofs offered on the motion the plaintiff introduced the affidavit of J. T. Smith, a resident of Morehead, Neosho county, Kansas, which reads:

"J. T. Smith, of lawful age, being duly sworn, on his oath says: That he resides at Morehead, Neosho county, Kansas, and that he is a user of natural gas, which he obtained from the Federal Betterment Company; that affiant is one of the proprietors of the Morehead Manufacturing Company, which said factory is located just west of Morehead, in Neosho county, Kansas; that affiant not only made contracts with said Federal Betterment Company or with its foreman and agent, W. Kinney, for the use of gas in his residence but also for gas for said factory; affiant knows that said Kinney employed all the hands and hired, worked and discharged all the men that put in the gas lines for said defendant company; that he, said Kinney, paid off all the company's hands; that he, said Kinney, made all contracts with gas users; that he put in all pipe-lines and connected the defendant's high-pressure line with the buildings of all gas users; that said Kinney collected the gas rentals due said company each month and receipted for the same in the name of said defendant company, by 'W. Kinney, its agent or managing foreman;' that said Kinney did and performed all things for and in behalf of said company in Neosho county; that said Kinney was located a part of the time each month at Morehead, Neosho

county, Kansas, in the discharge of his duties as agent and field manager of said defendant, and that he sold gas at Morehead, and collected same monthly in the name of said defendant, the Federal Betterment Company; that affiant has seen as many as twenty-five receipts given by said Kinney to Neosho county gas users prior and up to the injury of plaintiff herein, which receipts were signed in the name of the defendant company, by W. Kinney, agent and superintendent for said company.

"That said company has gas lines in Montgomery, Labette and Neosho counties, in Kansas, and affiant knows that said W. Kinney has always acted as the managing agent of said defendant company in said counties, and that, save and except said Kinney, there never was any other authorized person to represent said defendant in Neosho county; that said Kinney, the agent and superintendent of said defendant company, is the person who put in the first meter in the shop where Reeves was injured, and that affiant notified him or some of his workmen that it would not work, when he came back and said to lead the joints and then turn in the gas, that it would then be ready to use; that after Reeves's injury said Kinney came back to put in a regulator and a new meter and took out the scraps of the one that had been blown to pieces; that said Kinney always appeared as though the gas line was his or that he had supreme control of its affairs for said defendant, the Federal Betterment Company; that affiant was and is the duly appointed, qualified and acting deputy sheriff of I. F. Yockey, and that he served the summons in this action upon said Kinney as agent, foreman and representative of said defendant company, as more fully set forth in the returns on said original summons now on file in this action; that at the time said I. F. Yockey was and is the duly elected, qualified and acting sheriff of Neosho county, Kansas."

The motion to quash was denied, to which ruling the defendant excepted. Thereafter it filed its answer, and the cause was tried by the court and a jury, a verdict was returned, and a judgment rendered thereon for the plaintiff. Defendant complains.

The first alleged error is the order of the court in

denying defendant's motion to quash the summons. It contends that there is but one way by which service can be had upon a foreign corporation that has been granted permission to do business in Kansas, and that is by having the summons directed and delivered to the secretary of state, as provided in section 1262 of the General Statutes of 1901. That section reads:

"Actions against any corporation organized under the laws of any other state, territory or foreign country, and doing business in this state, may be brought in any county where the cause of action arose or in which the plaintiff may reside. The summons shall be directed to the secretary of state, and shall require the defendant to answer by a certain day, not less than forty days nor more than sixty days from its date. Said summons shall be forthwith forwarded by the clerk of the court to the secretary of state, who shall immediately forward a copy thereof to the secretary of the corporation sued; and thereupon said secretary of state shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copy, the name and address of the person to whom he forwarded said copy, and the costs for service and return thereof. Such return shall be under his hand and seal of office, and shall have the same force and effect as a due and sufficient return made by the sheriff on process directed to him."

To this contention we do not agree. Section 4504 of the General Statutes of 1901 provides that "where the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." The defendant is a foreign corporation, and service of process may be had on such persons in any of the ways provided by statute. It might have been had, as contended by the defendant, by delivering the summons to the secretary of state; but this is not the only way. Service might possibly have been made in this particular case by delivering the summons to any of its officers residing in the state, under section 4483

of the General Statutes of 1901. Section 4504 provides an additional way. None of these provisions is exclusive of the others. Where there are several methods for obtaining such service the plaintiff may select any one. The corporation cannot complain that he did not select some other equally good way. Statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended, namely, that of bringing such persons into court. They are permitted to enter the state by comity only, and in the methods of subjecting them to the jurisdiction of the courts they cannot insist upon a technical or strict construction in their favor. If, therefore, the non-resident defendant corporation had a managing agent in the county of Neosho, where the action was brought, service could have been had on the corporation by serving the summons on such managing agent in that county. The question then is, Was W. Kinney the managing agent of the defendant? This is a question of fact, and it must be determined from the affidavits of Freeman and Smith.

It will be observed that the affidavit of Mr. Freeman on the question of agency is very general in terms. The specific statement is: "But affiant avers that said W. Kinney was not at the time of such pretended service, had never theretofore been, and is not now, an officer or agent of said company." This is but the statement of Mr. Freeman's conclusion. It is not a detailed statement of what Kinney's duties to the corporation were. The court was not given the facts as Mr. Freeman understood them, from which it could have arrived at a conclusion; instead of doing this the affiant gave his conclusion, and he may have believed that Kinney was not, as he expressed it, the "agent of said company." He may have believed that it required the appointment of the board of directors to constitute Kinney a managing agent of the company, and being secretary he knew this had never been done.

Betterment Co. v. Reeves.

The affidavit of Smith was a detailed statement of the acts performed by Kinney for the company, from which the court below concluded that Kinney was the managing agent of the company, within the meaning of the section of the statute authorizing the service of summons on a managing agent of a foreign corporation, and in this we think the court was correct.

Whether one is a "managing agent" of a foreign corporation on whom service of summons may be made must depend in every case upon the kind of business conducted by the corporation, what the general duties of the supposed "managing agent" are, and whether it can be fairly said that service on such agent would bring notice to the corporation. Much discussion may be found in the cases upon this question, and it is one upon which there is some disagreement. It may be said, however, that the later decisions are more liberal in interpreting the term "managing agent" than were the earlier ones. While no general rule can be stated which will serve as a test, certain principles may be announced which will serve to assist in determining the matter. Such managing agent must be in charge, and have the management, of some department of the corporation's business, the management of which requires of the agent the exercise of an independent judgment and discretion; not that he shall not be under the general direction of the corporation—all agents are subject to the general control of their principals—but in the management of his particular department he must have authority to manage and conduct it as his discretion and judgment direct. He must be in the exclusive and immediate control and management of that department, or of the entire works conducted at the place where he is in charge. In *Porter v. The Chicago and Northwestern Railway Company*, 1 Neb. 14, it was stated in the first subdivision of the syllabus:

"An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the seventy-fifth

section of the code, upon whom a summons may be served. It is immaterial where he resides."

In *Coler et al. v. P. B. Co.*, 146 N. Y. 281, 40 N. E. 779, the court said:

"It is not necessary that the office of the person to whom the summons is delivered, in a suit against a foreign corporation, should be precisely described as that of 'a managing agent;' because, as we think, from the language of section 432 of the code of civil procedure, it was intended that any person holding some responsible and representative relation to the company, such as the term 'managing agent' would include, might be served with the summons." (Page 283.)

In the case of *American Express Company v. Thomas Johnson*, 17 Ohio St. 641, the question came up on the alleged insufficiency of the service of the original summons. The court said:

"At the time of service the company had a general 'superintendent' for the state, residing at Cleveland, and two or more 'local agents' in the county of Madison; one of whom resided at London, in said county, and kept an office there, where he received and forwarded packages for the company, and did all the business of the company usually transacted in such receiving and forwarding offices. Service was made upon the said agent at London alone; and the question is, whether he was the 'managing agent' of the company, within the meaning of the sixty-eighth section of the code? We think he was such managing agent, and that the service was sufficient."

In *Brewster v. The Michigan Central Railroad Company*, 5 How. Pr. (N. Y.) 183, the court said:

"The managing agent upon which the summons may be served must be one whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business." (Page 186.)

This language was referred to and criticized in *Hat-*

sweat Manuf'g Co. v. Davis Sewing-machine Co., 31 Fed. 294, 295, as follows:

"The language quoted is much broader than that used in the subsequent cases, and was not necessary to the decision of the case; since it appeared that the alleged agent was employed with very limited powers, in connection with a very small part of the defendant's business. . . . The adjudications in the state courts have not gone so far as to hold that no agent is a 'managing agent' who does not participate in the management and control of *every part* of the corporate business, and of every corporate act. Still less has such a construction of these words been given in any local action like this, where that construction would defeat justice, and enable a corporation systematically to violate the law with impunity. Such a construction, it seems to me, would be unreasonable, and presumably foreign to the intent of the statute, when the words 'managing agent' are equally capable of including a case of the management and control of that department of the company's business out of which the wrongs proceed."

This question was before the court in *Reddington v. Mariposa L. & M. Co.*, 19 Hun (N. Y. Supr. Ct.) 405, where it was said:

"It is quite clear that the legislature attached importance to the term *managing agent*, and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable, and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation." (Page 408.)

A more serious question arises upon the objections to certain testimony of Dr. C. C. Surber, who testified as follows:

"(9) Ques. Did you learn at that time from Reeves, or his attendants, that he claimed to have re-

ceived a violent injury to the left side of his head, about December, 1903, from the explosion of a gas-meter? Ans. Yes, sir."

"(3) Q. Could such an injury as Reeves claimed to have received produce such a condition as you found at that time in his case? A. Yes, sir."

"(6) Q. From the history of the case, as you learned it, and from your diagnosis of the case, taking into consideration Reeves's age and his general condition, do you consider the injury to his left ear and the left side of his head of a permanent or temporary character? A. I would say a permanent."

The witness was an expert who, under the rules of evidence, might give his opinions based either upon facts testified to by others or upon hypothetical questions put to him, or upon an examination of the patient, but he could not testify to conclusions arrived at from the history of the case given him by the patient or others. Such testimony would be as completely within the rule against hearsay evidence as if sworn to by one not an expert. Nor can a physician give his opinion based partially upon what he has been told of the case and partially upon what information he obtained by an examination of the patient. Questions and answers 9, 3 and 6 fall fairly under the objection that the answers were based partially upon a personal examination and partially upon the statements of others. (*A. T. & S. F. Rld. Co. v. Frazier*, 27 Kan. 463; *Heald v. Thing*, 45 Me. 392.) A physician may testify to the condition of the patient as he found him, whether suffering from pain, and to utterances or exclamations of pain, and he may also give the patient's statement as to the location of the pain causing such exclamations; and this because it can be said to be a part of his examination.

There are numerous assignments of error. Objections were made in some instances to nearly every question asked of a witness, many of which are frivolous. An examination of all of the assignments satisfies us that no error was committed, except as sug-

gested. For this reason the judgment is reversed, and the cause remanded.

JOHNSTON, C. J., BURCH, MASON, SMITH, GRAVES, JJ., concurring.

PORTER, J. (dissenting): I dissent from the statement of law in the second paragraph of the syllabus. I think an attending physician is competent to testify, unless the matter is privileged, to his conclusions with reference to the character and extent of a patient's complaint or injury, and to base his opinion upon his examination and treatment in connection with the "history of the case" obtained from the patient. If the patient relates to him the manner in which he was injured, and even the details of the accident, it is not to be presumed that the physician permits such statements to affect his opinion of the character and extent of the injury. Some part of his professional opinion is necessarily based upon statements of the patient in answer to his questions. If he is a competent physician his technical knowledge will prevent the patient from imposing upon his credulity. (*Block v. Milwaukee Street R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Quaife and wife v. The Chicago & Northwestern R'y Co.*, 48 Wis. 513, 4 N. W. 638, 33 Am. Rep. 821; *The Louisville, New Albany and Chicago Railway Company v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; *Barber and wife v. Merriam*, 93 Mass. 322, 325; Rogers, Exp. Test. § 47, and cases cited.) A different rule obtains where the physician is consulted solely for the purpose of having him become a witness. (*Stewart and another v. Everts*, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.). In this case, while the questions asked the physician were somewhat broader than necessary, he was competent to testify as an expert from his examination and treatment, and it does not appear that the error was prejudicial.

THOMAS VOSS *et al.* v. W. O. GOSS.

No. 14,489. (84 Pac. 564.)

SYLLABUS BY THE COURT.

EXEMPTIONS—Head of a Family—Food for the Support of Stock. The sixth subdivision of section 8 of the exemption law (Gen. Stat. 1901, § 3018), which exempts to a person residing in this state, and the head of a family, the necessary food for the support of exempt stock owned by him, does not entitle him to claim, in the absence of food for stock, a crop of wheat for the purpose of selling the wheat and purchasing food for the support of such stock.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed February 10, 1906. Reversed.

Dale & Amidon, for plaintiffs in error.

Adams & Adams, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: W. O. Goss brought this action against Thomas Voss, marshal of the city court of Wichita, and the State Bank of Goddard, to recover damages for the conversion of a crop of wheat levied upon in attachment proceedings in the city court in an action in which the bank was plaintiff and he was defendant. The action is based upon the claim that the wheat was exempt from seizure and sale. Goss's interest in the crop of wheat was a three-fifths share, the remainder belonging to the owner of the land. There was a trial before the court and a jury, which resulted in a verdict for plaintiff in the sum of \$183.85. A motion for judgment upon the special findings was denied, as was the motion for a new trial, and defendants bring error.

Several errors are assigned, but it will not be necessary to consider all of them. Plaintiff is the head of a family, and claims that the wheat in controversy was

exempt to him under section 3018 of the General Statutes of 1901, for the reason that he owned a team of horses and that the wheat was necessary as food for their support. That part of section 3018 which must be considered reads as follows:

"Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property: . . .

"*Sixth*, The necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose; also, one wagon, cart or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars."

The clause preceding the sixth exempts a span of horses to the head of a family.

It is the contention of plaintiff that inasmuch as he had raised no crops that season except this wheat, and because it was customary in that vicinity to feed wheat to horses, he was entitled to claim the wheat as exempt for that purpose. It is argued that as the statute makes provision for food necessary for the support of stock for one year, without making any distinction with reference to the particular kind of food to be used for any class of animals, it was intended to leave to the debtor the selection of the kind of food. The principal witness for plaintiff was the plaintiff himself. He testified that it would have probably required 250 bushels of wheat to feed this team for a year, but that he had never fed any wheat himself to horses; also, that he had at the time the levy was made six tons of cane, but intended to sell the cane and buy food for his family. It appears that when the levy was made he claimed fifty bushels of this wheat as exempt for bread for his family, and that amount was set apart to him, but that he made no claim at that time that any of the wheat was necessary

for the support of his stock. He claimed it, however, before the sale. On cross-examination he testified:

"Ques. You know, as a matter of fact, that you would not feed ninety-cents-a-bushel wheat, would you? Ans. No, sir. But I would sell it and buy feed with it.

"Q. That is what you intended to do with this? A. Yes, sir.

"Q. Did n't intend to feed this wheat? A. No, sir; intended to have feed out of it. I intended to sell wheat and buy feed."

It also appeared by others of his witnesses that, while they had known of wheat being fed to horses, it was not the custom to do so when wheat was ninety cents a bushel and corn and oats much less; and none of the witnesses could give an instance where wheat was fed to horses the fall and winter after the levy of the attachment.

The principle involved in this case has been decided by this court in *George v. Hunter*, 48 Kan. 651, 29 Pac. 1148, 30 Am. St. Rep. 325. The facts in that case are the same as in this, except that the debtor there claimed all the wheat for the support of his family, and contended that having no other provisions he had the right to take, in addition to sufficient wheat for bread for the family, enough more to sell and purchase other necessary provisions. The case turned upon the construction of the word "support," in the seventh subdivision of the statute, and also the same word in the sixth subdivision. The court, after quoting both subdivisions of the statute, said:

"The language of subdivision 6 of the paragraph is 'the necessary food for the support of the stock mentioned in this section for one year.' It will not be said that the word 'support,' in this subdivision, means anything more than sufficient food to feed the stock for a year, and we think the word 'support' in the seventh subdivision is employed in the same sense, and simply means, in connection with the other substantive words therein, grain, meat, or groceries on hand, sufficient to

feed the family for one year, or sufficient for the use of the family as food for one year. If a family has on hand 1000 bushels of wheat, but no meat or groceries, we do not think they may have as exempt sufficient wheat to bread the family a year, and in addition thereto sufficient to sell and purchase meat and groceries, or vegetables or other provisions. If the construction contended for by the plaintiff is correct, then, by the same reasoning, if the family had on hand a stock of groceries worth \$1000, but had no grain, or meat, or vegetables, or 'other provisions,' they might have exempt the whole stock, provided there was no more than sufficient, in addition to the necessary groceries for use of the family, when sold, to purchase grain, meat, vegetables and other provisions for the use of the family for one year. . . . The amount of exemption, or the benefit to be derived from any particular class of property, cannot be made to depend upon the possession or want of possession by the debtor of any of the other classes of property made exempt by any of the provisions of the exemption law." (Pages 652, 653.)

This court has uniformly given a liberal construction to the exemption laws, but to uphold the contention of plaintiff would be to hold that if he possessed 5000 bushels of wheat he should be permitted to keep and sell a sufficient amount of it to purchase any of the numerous necessary articles mentioned in the fifth or sixth subdivisions which he happened to be without. If he could claim as exempt 250 bushels of ninety-cent wheat for the purpose of sale to buy necessary feed for the support of his stock, he would, upon the same principle, be entitled to claim the same amount of any other personal property to be sold for the same purpose. This construction would render the various classifications of exempt property in the statute useless.

Defendants' demurrer to the evidence should have been sustained upon the admission of plaintiff that it was not his intention to feed this wheat to his horses, but, on the contrary, to sell it and buy other food, and

Benefit Association v. Wood.

the uncontradicted testimony offered by him that wheat was not regarded in the vicinity as food for horses at the time the wheat was taken. The judgment is reversed.

All the Justices concurring.

THE TRIPLE TIE BENEFIT ASSOCIATION V. ROSA MAHAFFEY WOOD.

No. 14,490. (84 Pac. 565.)

SYLLABUS BY THE COURT.

FRATERNAL INSURANCE—Application — Membership — Monthly Assessment. The constitutional provisions of a fraternal insurance association relating to beneficiary certificates constitute a part of the contract between such association and its members. When the constitution of such an organization provides that "no beneficiary certificate shall be or become effective or in force until executed by the supreme president and supreme secretary, countersigned by president and secretary of the local council to which the member may belong, and the conditions of the certificate accepted by the member to whom it is issued in writing on his certificate," a monthly assessment paid at the time an application is made for membership in such order cannot be applied before such constitutional provisions have been complied with.

Error from Neosho district court; LEANDER STILLWELL, judge. Opinion filed February 10, 1906. Affirmed.

Coleman & Williams, for plaintiff in error.

W. R. Cline, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: This action was brought to recover upon a beneficiary certificate issued by the defendant to A. A. Mahaffey, in behalf of his wife, the plaintiff.

73 124
76 513

Benefit Association v. Wood.

At the trial the district court filed findings of fact and conclusions of law. From the facts so found it appears that the defendant authorized the local council to take in members free of cost during the months of November and December, 1903. A circular to this effect was shown to Mahaffey. It contained this statement: "All that is required is for the amount of one monthly payment to be deposited with the application card, and for you to complete your membership and take up your certificate before the last of December."

Mahaffey took advantage of this offer, made application for membership, and paid the amount of one monthly assessment. This application was signed and handed to a member of the order in the month of December, 1903, and by him delivered to the local council. The council held its meetings on the first and third Saturdays of each month. At one of its meetings the application of Mahaffey was accepted, and he was elected a member of such council. The certificate was signed by the grand officers on December 29, 1903. On January 16, 1904, Mahaffey was initiated into, and became a member of, the local council, at which time the officers of the council signed the certificate and delivered it to Mahaffey, who signed his acceptance thereon. No fees were demanded of or paid by him when he was initiated and received the certificate as aforesaid. About the last of January demand was made on Mahaffey for the payment of another monthly instalment. He told the secretary he was unable to pay it, and the secretary as a matter of friendship paid it for him. These two instalments are all that were paid by or for Mahaffey, and he died March 22, 1904.

The district court found that these two payments should be applied for the months of January and February, and that, the March payment not being due until the last day of the month, the certificate did not

lapse. The defendant brings this proceeding in error, claiming that the payments should be applied on the months of December and January, and that therefore the certificate lapsed upon failure to pay the assessment due on the last day of February. The constitution of the order provides as follows:

“Upon receipt of the beneficiary certificate the amount of one monthly payment shall be paid by the member to the secretary of the local council, and on or before the last day of each succeeding month the member shall pay, without notice, a like sum to the secretary of the local council, or, if holding a supreme council card, to the supreme secretary; the amount of such payment shall be such as is fixed in the table on the back of the beneficiary certificate of the member, according to the age at the time of becoming a member of the association, as shown in the table of ages and monthly rates given in section 2 of this article, which is hereby added.” (Art. 9, § 1.)

“No beneficiary certificate shall be or become effective or in force until executed by the supreme president and supreme secretary, countersigned by president and secretary of the local council to which the member may belong, and the conditions of the certificate accepted by the member to whom it is issued in writing on his certificate.” (Art. 7, § 11.)

On February 29, 1904, the local council suspended Mahaffey, as being in default for the assessment due that month.

We agree with the conclusions of the district court. The offer to take in members free of cost for a limited time was not intended to make any other change from the ordinary rules of the order. The association was not bound by the transaction until a contract was completed. The applicant had to become a member before he was entitled to the benefits of the order. The assessment paid when the application was made could not be applied until it was known that the local council would accept the applicant as a member, nor until he passed a satisfactory medical examination, nor until the grand and local officers had executed the certificate and it

Garner v. Insurance Co.

had been delivered to and accepted by the applicant in writing. Until this time the whole matter was incomplete and subject to repudiation by either party.

These constitutional provisions were indorsed on the certificate, and formed a part of the contract. They were evidently made for the protection of the association, and both parties are bound thereby. What the rights of the respective parties would be in the absence of these conditions it is unnecessary to inquire. This court has uniformly held that the rights of members of beneficiary societies rest in contract, and must be measured thereby. The rule stated in *Kemper v. Modern Woodmen*, 70 Kan. 119, 78 Pac. 452, applies here, and controls the decision of this case.

On January 16 the contract between Mahaffey and the association became complete, and then for the first time the assessment paid at the time of the making of the application became available to the association and satisfied the January assessment. The February assessment was paid by a friend. Mahaffey died before the last day of March, and during the life of the certificate. The judgment of the district court is affirmed.

All the Justices concurring.

T. F. GARNER V. THE MILWAUKEE MECHANICS'
INSURANCE COMPANY.

No. 14,494. (84 Pac. 717.)

SYLLABUS BY THE COURT.

1. FIRE-INSURANCE—*Forfeiture Clause—Change in "Interest."*
The word "interest" in the forfeiture clause of an insurance policy which provides that the policy shall become void "if any change . . . take place in the interest, title or possession of the subject of insurance" has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the title.

2. ——— *Executory Contract to Convey the Property—Policy Not Affected.* Where the insured owns the title of the subject of insurance, and makes an executory contract to convey the property, and the consideration has been fully paid but no transfer either of title or possession has been actually made, no change has taken place in interest, title, or possession, within the meaning of the forfeiture clause quoted.

Error from Ford district court; EDWARD H. MADISON, judge. Opinion filed February 10, 1906. Reversed.

Sutton & Scates, and F. Dumont Smith, for plaintiff in error.

F. J. Oyler, and Fyke & Snider, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: The plaintiff was defeated in an action on a fire-insurance policy, and to reverse the judgment he prosecutes this proceeding.

The policy contained a provision that it should become void "if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise." When the insurance was obtained the insured was the owner of the title to the property; subsequently he entered into the following contract:

"This contract and agreement, made and entered into this 16th day of June, 1903, by and between Joseph W. Baker, of Bates county, Missouri, party of the first part, and T. F. Garner, of Ford county, Kansas, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part all his land situated in sections 4 and 5, township 39, range 30, Bates county, Missouri, consisting of 364 acres, in consideration of which the party of the second part agrees to pay to the party of the first part the sum of \$10,920, to be paid as fol-

lows: To assume the present mortgage on said land to the amount of \$4800, and half of the interest on same from March 1, 1903, to date, and one livery-stable in Dodge City, Kan., with lots comprising site of same [describing them], to be valued at \$6000, and thirteen head of horses, two surreys, one spring wagon, one cart, seven buggies, one farm wagon, four sets of double driving harness, one set of heavy work harness, seven sets of single harness, one side-saddle, one man saddle, and all other fixtures now a part of said stable; said chattel property to be valued at \$1500.

"It is further agreed that the said second party is to loan the first party the sum of \$3880, at eight per cent. per annum, to be secured by said above-mentioned livery-barn and chattels.

"Party of the first part agrees to give a clear and perfect abstract to his land, with a warranty deed to the same, subject to the above-mentioned encumbrance.

"Party of the second part agrees to give to the first party a good bond for a deed, said deed to be made when said above-mentioned loan shall be repaid; and also a good and perfect abstract to same; each party is to give immediate possession to property.

"Witness our hands and seals, this day and year above written.

(Signed) JOSEPH W. BAKER.

"Witness:

(Signed) T. F. GARNER.

G. G. Cook.

U. S. G. Powell."

Baker deeded to plaintiff the Missouri land, which was the full consideration to be paid by him for the insured property. The plaintiff made no conveyance, nor had he delivered possession at the time the property was destroyed by fire—July 29, 1903. The defense was that by this contract a change had taken place in plaintiff's interest in the subject of insurance, which, under the condition quoted, forfeited the policy.

Forfeitures are not favored, and will never be enforced if by a reasonable interpretation of the agreement and contract of the parties they can be avoided. The provision was intended to protect the company

against any increased hazard resulting from a change of interest, title or possession of the insured. An insurance company may contract against such a contingency, and if such provision of the contract be violated it would have the right to insist upon being released from liability. The company contracted for the care, supervision and vigilance of the assured in protecting the property from fire. This is largely its security against loss, and a disposition by the assured of all of his interest, title or possession in the property, or of such a substantial part thereof as would entirely or partially abate this diligence, would be a violation of the contract.

The word "interest" as used in the policy is not synonymous with title. It means some right different from title. It cannot mean a greater estate than title, since "title" as there used was intended to mean the entire estate. It must therefore have been used with the meaning generally attached to it when used in contradistinction to title—as "any right, in the nature of property, less than title." (Anderson's Law Dict. 562.) "In a narrower sense it was used in the English common law of real property to designate a right less than an estate." (3 Cent. Dict. 3142.) This we think is the sense in which it was used in the policy. In the interpretation of the policy this word is important. The form of the policy was intended to cover two classes of risks. There are large interests in real estate owned by persons who have neither title nor possession. The form of this policy is adapted to the insurance of such interests, as well as to the insurance of property where the insured is the owner of the title. Where the insured is the owner of only an interest in the estate the word "interest" used in the forfeiture clause has force, and any change in such interest would forfeit the policy; but where the insured is the owner of the title the word "interest" has no application. In the latter case, if any change take

place in the title the policy would become forfeited.

The insurance in the present case was procured by one owning the title; as to him only a change in the title would forfeit the policy. We do not feel inclined to follow the decision of *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405, because we do not believe that the word "interest" as used in the policy in that case, which was the same as the one we are considering, is broader than, and inclusive of, title; and because in that case it was wholly unnecessary to define "interest." After Gibb had procured the insurance he sold the insured property by a written contract, and gave possession to the purchaser, who remained in possession until the property was destroyed. This of itself was such a violation of the express terms of the policy against change of title or possession as would render the policy void.

The main contention of defendant is that the contract between Baker and Garner for the sale of the insured property, having been fully performed by Baker, is enforceable in equity against Garner; therefore, it operated as a present change of interest in the property, within the forfeiture clause of the contract. A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees, and upon an assumption that his forecast is correct ask a court to declare a forfeiture. For the purpose of finding grounds for a forfeiture courts of law will not go so far afield as to determine the enforceability of a contract in equity between parties not before it. If, however, this court should believe that specific performance of that contract could be decreed, the relief asked for by defendant would not be granted. It has been held that an executory contract to convey insured real estate does not operate as a forfeiture of the policy under a provision that it should be void "if the interest of the

Moorhead v. Arnold.

assured be or become other than the entire, unconditional, unencumbered and sole ownership of the property" (*Arkansas Fire Insurance Co. v. Wilson*, 67 Ark. 553, 559, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. Rep. 129; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188), or where the condition of the policy is that it shall be void in case "the property be sold or transferred, or any change take place in title or possession" (*Browning v. Home Insurance Company*, 71 N. Y. 508, 27 Am. Rep. 86), or "if any change take place in the interest, title, or possession of the subject of insurance." (*Erb v. Insurance Co.*, 98 Iowa, 606, 613, 67 N. W. 583, 40 L. R. A. 845; *Insurance Co. v. Tompkins & Co.*, 30 Tex. Civ. App. 404, 71 S. W. 812.)

The judgment is reversed, and the cause remanded.

• All the Justices concurring.

E. MOORHEAD V. G. F. ARNOLD.

No. 14,496. (84 Pac. 742.)

SYLLABUS BY THE COURT.

1. **ELECTIONS — Preservation of Ballots — Finding by Contest Court—Review.** Findings made by a court organized for the trial of a contested county election, relating to the physical appearance, condition and contents of a sack produced before it as the one in which the ballots from an election precinct had been sealed up and conveyed to the county clerk, will not be set aside for the lack of evidence when the bag with its contents was brought into the immediate presence of the court for inspection and both the bag and its contents were inspected by each of the three judges.
2. ——— **Ground of Objection to Recount of Ballots Need Not be Pleaded.** An objection by the contestee to the counting of papers offered by the contestor as the ballots from an election precinct, on the ground that they have not been preserved as required by law and are not brought into court in the same condition as that in which they were left by the

Moorhead v. Arnold.

election board, is an objection to evidence only, is not the statement of a defense to the causes of contest set forth in the contestor's statement, and the grounds of the objection need not be pleaded in the contestee's answer.

3. ——— *Custody and Identity of Ballots—Waiver of Investigation—Court Not Precluded Thereby.* The mere fact that, upon the production in court by the county clerk of what purports to be a bag of ballots from an election precinct, the contestee waives investigation concerning the custody and identity of the supposed ballots and the court proceeds to count them does not preclude the court, in its discretion and in the public interest, from making such investigation and rejecting such ballots as not the best evidence at any time before it finally determines who was elected.

Error from Lyon district court; FREDERICK A. MECKEL, judge. Opinion filed February 10, 1906. Affirmed.

STATEMENT.

THE official returns disclosed that G. F. Arnold was elected to the office of county commissioner from the second commissioner district of Lyon county over his opponent, E. Moorhead. In due time Moorhead commenced a contest for the office, alleging errors and mistakes on the part of the judges, clerks and canvassers of election in ascertaining and declaring the result of the election whereby legal ballots in his favor were rejected, whereby the benefit of ballots cast for him was lost in keeping and footing the tally-sheets, whereby ballots for him were counted for the contestee, and whereby defective and illegal ballots were counted for the contestee. The contestee denied the contestor's claims, and asserted that ballots for him had been thrown out and that mistakes in counting and tallying had been made against him. A contest court was duly organized and a trial begun. Proceedings were then had as follow:

"And thereupon . . . the said clerk produced in court the said ballots cast in Americus precinct. . . .

"Suggestion by the court that the county clerk be sworn and show the custody and identity of the ballots.

"Thereupon the swearing and testifying of W. F. Eggers, as county clerk, was waived by the attorneys for the contestee.

"Thereupon the clerk in open court opened the ballots, which were contained in a gunny-sack and strung upon a cord.

"It was here agreed by the attorneys for the contestee and contestor that the attorneys should examine the ballots, and such as were conceded to be lawful and valid ballots should be counted for the respective parties, and such as should be excepted to by either party should be passed to the court, marked for identification, and reserved for the further consideration of the court.

"In pursuance of the said agreement the ballots were brought into court in the order of precinct as named in the statement of contestor, and counted in the same order.

"All of the ballots of all of the precincts of the said commissioner district were counted except the ballots from Phillips and Reading precincts, and the contested ballots from the other precincts. Each of the parties took an objection to one ballot for each the contestor and contestee of the ballots from Americus precinct, which objection was overruled and both ballots counted, one for each party, both parties agreeing they were good ballots. And thereupon the court adjourned until nine o'clock A. M. of the 24th of December, 1904.

"On December 24, 1904, the court having convened and all parties being present, it was ordered that said court proceed, and the clerk was ordered to produce the balance of the ballots cast at said election in the said district, and they were produced and counted in the following order: (1) Phillips precinct; (2) Reading precinct.

"The undisputed ballots having been counted by the court, the court then heard arguments of the attorneys touching the validity of the ballots which each side claimed should not be counted.

"Thereupon the court took the matter under advisement until the 27th day of December, 1904, and declared the court adjourned until that date, at nine o'clock A. M.

"At nine o'clock A. M. on the 27th day of December, the court having met pursuant to adjournment, and all parties being present, the contestee produced W. F. Eggers, county clerk, as a witness in his behalf.

"The contestor objected to the introduction of any evidence for the reason that the same was incompetent, irrelevant and immaterial under the pleadings, no fraud having been alleged by either party, and as tending to throw no light on any issue joined in the pleadings. The said objection was by the court overruled, and at the time excepted to by the contestor."

At this point in the record there follow some fifty-eight pages of evidence introduced by both parties relating to the authenticity of the ballots produced by the county clerk as the ballots received by him from Americus township, and relating to the manner in which the ballots cast in that township were counted and the official returns of the election kept. The record also contains the following statement:

"During all of the contest, while any and all of the ballots, or purported ballots, sacks or papers were in the contest court, the same were in the immediate presence of all three of the judges for inspection and were inspected by said judges, except the ballots agreed to by counsel as being valid on their face."

The contest court made elaborate findings of fact and conclusions of law, as follow:

"Our reasons for putting our decision in this contest in writing is that the questions involved are unusual, and we wish to put on record not only what we do, but why we do it. By the official returns Mr. Moorhead received 816 votes and Mr. Arnold 850 votes, giving Mr. Arnold a majority of 34 votes, and he received the certificate of election. In due time Mr. Moorhead filed a contest, putting in issue the count and official returns of each of the election precincts in the commissioner district. A proper determination of this issue involved a recount of all the votes cast in the second commissioner district of this county. What purported to be the ballots cast at each of the nine precincts in the district were brought before the contest court, by the proper custodian of such

ballots, the county clerk, and examined in the presence of the court. Of the ballots counted by several election boards, both contestor and contestee agreed in open court that all but 116 were valid and were counted as such. These 116 were objected to, some by the contestor and some by the contestee, because it was claimed that there were distinguishing marks thereon. As to 64 of the 116 ballots objected to the objections are overruled and the votes counted; as to 52 of them the objections are sustained and they are not counted. Of the objectionable ballots thus counted 36 are Arnold votes and 28 are Moorhead votes, and of the 52 ballots not counted by the contest court 26 are Arnold votes and 26 are Moorhead votes. There were also presented to the contest court, by the contestor, what purported to be 33 ballots cast in the Americus township precinct, which were rejected by the election board, and 4 of these which were Moorhead votes were found not to have distinguishing marks thereon, and so far as any invalidity by reason of any such marks they should have been counted for Moorhead. If these 4 votes are counted and there is added thereto the votes conceded to be valid on their face for Mr. Moorhead, and the 28 objectionable votes counted for him, it will give him 816 votes in the district, while the votes conceded to be valid on their face cast for Mr. Arnold, and the 36 objectionable votes counted by this court for him, will give him but 805 votes in the district, and giving Mr. Moorhead a majority of 11.

“Mr. Arnold, however, objects to the counting by this court of any of the ballots purporting to have been cast at the Americus precinct, for the reason that they have not been preserved as required by law, and were not brought into the contest court in the same condition in which they were left by the election board, and are therefore not as good and safe evidence of the vote cast in the Americus precinct as the returns kept and made by the board to the county commissioners as provided by law. The official returns, as shown by the tally-sheets kept and returned by the Americus election board, give Mr. Moorhead 219 votes, and Mr. Arnold 200 votes. The count by this court of the purported ballots from that precinct gives Mr. Moorhead 239 votes, and Mr. Arnold but 187 votes. Mr. Moorhead’s majority on the face of the returns is but 19 in

Moorhead v. Arnold.

Americus precinct, and on the count made by this court of the purported ballots from that precinct his majority there is 52, being a difference of 33 votes in favor of Mr. Moorhead, and if that is taken as correct it gives Mr. Moorhead a majority of 11 in the district; but if the count as returned by the election board is taken as the best and safest evidence of the Americus vote, it gives Mr. Arnold a majority of 22 votes in the district. It is therefore apparent that the controlling question of this contest is, Which is the best and safest evidence of the vote cast in the Americus precinct?

"The law makes the count and returns of the election board *prima facie* evidence of the Americus vote, and lays upon Mr. Moorhead the burden of showing by competent evidence that such returns are incorrect so as to affect the result of the election of commissioner in the second commissioner district. The law also makes the ballots, when properly preserved and produced, the primary and controlling evidence, and if such ballots and the returns made by the election board differ, the ballots will control and be admitted as the best and safest evidence. It was said, however, by our supreme court, in *Hudson v. Solomon*, 19 Kan. 177, 186, that 'in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.'

"This principle was announced by Mr. Justice Brewer, now one of the justices of the supreme court of the United States, and has been adhered to by our courts ever since. Other courts have laid down the same rule. In *People, ex rel. Dailey et al., v. Livingston*, 79 N. Y. 279, 290, it was said: 'Every consideration of public policy, as well as the ordinary rules of evidence, requires that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest but the most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable

to find from the evidence that actual tampering or fraud had been committed.'

"In *O'Gorman v. Richter*, 31 Minn. 25, 30, 16 N. W. 418, the supreme court of Minnesota said: 'It is incumbent, however, upon the party offering the evidence to show clearly, and to the satisfaction of the court, that the ballots have been preserved intact, before they can be admitted.'

"In *Newton v. Newell*, 26 Minn. 529, 540, 6 N. W. 346, the court held that 'it must affirmatively appear that they . . . have been "carefully preserved." They must have been so carefully preserved as to place their identity beyond any reasonable doubt.'

"In the fourth edition of McCrary on Elections, section 472, it is said: 'The burden of proof in such a case does not rest upon the party objecting to the ballots as evidence.'

"Other authorities are to the same effect, and the law is therefore well settled that to entitle Mr. Moorhead to have these Americus ballots counted he must show their identity to the satisfaction of the court, and that they have been preserved substantially as required by law, and if he fail to do so the return of the election board is the best evidence.

"The supreme court of California said, in *People v. Burden*, 45 Cal. 241, that 'if there is evidence tending to show that the ballots cast at an election are not sealed up after being counted by the board of canvassers, or that the packages of ballots have been opened and changed after they were received by the clerk, the ballots on a recount by the board of supervisors are not the best evidence, but the court may adopt the result arrived at by the board of canvassers in determining who is elected.'

"To the same effect is McCrary on Elections, fourth edition, section 474, and other authorities. The evidence shows that the Americus election board strung all the counted ballots on a cord as they were counted, united the ends of the cord by a knot, but did not seal the knot with sealing-wax, as required by law; that after the counting they attempted to put the ballots into the large paper sack or envelope furnished by the county clerk for that purpose; that the string of ballots was too large to go into the large envelope, and in the attempt to put them into it the envelope was torn part way down one side, leaving a portion of the

Moorhead v. Arnold.

string of ballots outside; that they then took a gunny-sack, the only thing available, and put the large envelope with the ballots, part in and part out, into it—the gunny-sack—sewed it up, over and over the end with a cord, united the ends of such cord in a knot and sealed the knot with sealing-wax as best they could, and delivered it in that condition to the county clerk at Emporia; that the county clerk kept it with other packages of ballots received from other precincts in the vault in his office, up-stairs in the courthouse, for a few days, until he got time to take them to the storage vault in the basement of the courthouse, where the gunny-sack remained until a few days before the commencement of the hearing of this contest, when he brought it up to his office vault and placed it in a locker, where it remained until called for by the contest court; that while in the storage vault the gunny-sack was either in a box locked with a padlock, the key to which the county clerk carried on his person, or in a box with the lid nailed down; that the county clerk was away from Emporia for at least a week of the time that the gunny-sack was in the storage vault, and that others than himself knew the combination of the lock on the door of the storage vault, although he was not aware of that fact, and he did not know all who did have such knowledge of the combination on that door; that when the gunny-sack was brought before the contest court it was fastened in a different manner from that in which it was sewed up and sealed by the election board; that there was enclosed in the gunny-sack with ballots all, except a piece about six inches square, of a large paper sack or envelope such as was furnished by the county clerk to the election board wherein to return the counted ballots, all torn to pieces, and also a good-sized piece of another similar paper sack or envelope. In other words, there were parts of two similar paper sacks or envelopes enclosed in the gunny-sack said to contain the ballots counted by the election board of Americus precinct, the two parts of the envelope having on each identical printed matter or words. Upon this state of facts we are compelled to sustain the objection to these purported ballots as evidence. They are surrounded with unmistakable evidence of having been opened for some unexplained purpose, and their integrity and identity are thereby destroyed. There is

Moorhead v. Arnold.

no evidence tending to show who opened the gunny-sack in which the ballots were delivered to the county clerk, or when it was opened, but there is clear evidence that it was opened by some one between the time it was sealed by the election board and the time it was brought into the contest court, and that is sufficient to destroy the integrity of the ballots contained in such sack as the best and primary evidence. The testimony shows that the ballots have not been preserved so as not to be so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with, according to the rule laid down in *Hudson v. Solomon*, 19 Kan. 177.

"It is true that the testimony also shows that certain, and indeed numerous, clerical errors were made by the clerks of election in keeping the tally of votes in Americus precinct, and that no attempt was made to rectify the errors and discrepancies by a recount of any ballots; still the evidence is clear that all such errors were rectified and the tally-sheets corrected to the satisfaction of all the judges and clerks of election, and that to the best of their knowledge and belief every legal ballot was correctly counted and so entered on the tally-sheet.

"We therefore find that the returns of the election board are the best and controlling evidence of the vote cast in Americus precinct. These returns and our recount of the ballots cast in the other precincts in the district give Mr. G. F. Arnold a majority of 22 votes, and we find that he was duly elected commissioner for the second district in Lyon county, Kansas, and we pronounce judgment accordingly."

The district court sustained the contest court, and in this proceeding in error it is urged that the findings of the contest court are not sustained by the evidence; that the question of the authenticity of the ballots from Americus township was outside the issues made by the pleadings; and that an investigation of that matter was waived by the contestee.

W. C. Harris, and W. A. Randolph, for plaintiff in error.

Buck & Spencer, for defendant in error.

The opinion of the court was delivered by

BURCH, J.: In the second volume of Wigmore on Evidence, at page 1345, it is said that the law "assumes the objectivity of external nature; and, for the purposes of judicial investigation, a thing perceived by the tribunal as existing does exist." On the following page of the same work it is further stated:

"There is always a question as to the relevancy of a circumstance, or the qualifications of a witness; there can never be a question as to the relevancy of the thing itself, autoptically produced. Add to this that, since either sort of evidence, testimonial or circumstantial, is one step removed from the thing itself to be proved, the production of the thing itself would seem to be the most natural and efficient process of proof. If the question is whether a shoe is fastened by laces or by buttons, the testimony of one who has seen the shoe or the circumstance that a button has fallen from the shoe can at least be no more satisfactory than the inspection of the shoe in court. Accordingly, it might be asserted, *a priori*, that where the existence or the external quality or condition of a material object are in issue or are relevant to the issue, the inspection of the thing itself, produced before the tribunal, is always proper, provided no specific reason of policy or privilege bears decidedly to the contrary. Such ought to be, and such apparently is, the principle accepted by the courts." (2 Wig. Ev. § 1151.)

In one of the cases cited in support of this text it was said:

"There can be no objection to the other finding, to wit, 'that the plaintiff Nanny is a white woman.' The jury find this fact upon their own knowledge—in other words, by inspection. Was this improper? . . . If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others, which would have amounted only to a probability. But here, they have the highest evidence, the evidence of their own senses." (*Hook v. Pagee*, 2 Munf. [Va.] 379, 384.)

This court has gone far enough to uphold a verdict for damages in a railroad right-of-way case for the

expense of constructing and maintaining farm crossings although there was no evidence of the necessity of such crossings except the jury's view of the land. (*K. C. & S. W. Rld. Co. v. Baird*, 41 Kan. 69, 21 Pac. 227.) These authorities control the decision of the first question presented.

There is no dispute concerning the manner in which the election board of Americus township disposed of the ballots cast in that precinct as they were counted and after they were counted. There is ample evidence to sustain the finding of the contest court in reference to the manner in which the ballots were kept and exposed after they were returned to the county clerk and before they were brought into court. The members of the contest court needed no witnesses to tell them what they saw when the gunny-sack containing the supposed ballots was brought before them, and when it was opened. The record is specific upon the point that they did inspect the sack and its contents at that time. However strange it may seem that the bag should have been tampered with, this court cannot contend with the judges of the contest court in reference to the report of their own senses. Therefore this court cannot declare to be unsupported an unequivocal finding that the receptacle in which the ballots were kept was fastened in a different manner from that in which it was sewed up and sealed by the election board, and that it contained matter which the election board did not place there. Besides, the finding under consideration is supported by the testimony of one of the attorneys for the contestee, and by an inference from the testimony of one of the election officials of Americus township, so that the rule, sometimes invoked, that evidence obtained by inspection must be supplemented by evidence capable of being embodied in a bill of exceptions, has been complied with. (See *City of Topeka v. Martineau*, 42 Kan. 387, 391, 22 Pac. 419, 5 L. R. A. 775.)

The proceeding in this court is one in error. The facts cannot be retried here. Disputed evidence cannot

be weighed at all, and if an attempt were made to do so the most enlightening piece of information the contest court received—that afforded by an inspection of the bag and its contents—is unavailable.

The facts found bring the case clearly within the rule announced by the authorities cited and relied upon by the contest court, and the rejection by that tribunal of the ballots offered by the contestor as primary evidence to establish his claim must be sustained. The evidence was clearly sufficient to warrant the contest court in adopting the official returns as the next best evidence of the result of the election in Americus township, and its conduct in that respect is approved.

The complaint that the question which was raised concerning the authenticity of the papers produced by the contestor as the ballots from Americus township is not referred to in the pleadings is clearly not ground for reversal. The objection was to the introduction of certain papers not the best evidence. The facts upon which the objection was based did not constitute a defense to the contestor's claim, and would not have done so even if they had been stated in the answer. His causes of contest still might be true and easily provable, and certainly it is not permissible to plead in an answer facts merely as a foundation upon which to base objections to evidence which it is anticipated the moving party will use at the trial to sustain the allegations of his pleading. An answer subserves other purposes. Its function is limited to the definition of issues.

In this case the issue was the number of lawful ballots that had been cast at an election and the number which each of two candidates had received. The burden of proving that he had a majority rested upon the contestor. He offered in support of his claim certain papers taken from a bag produced by the county clerk. Then the inevitable question arose, What were those papers, and what persuasive effect ought to be conceded to them under the law? If they were genuine

ballots they were important; if they were not genuine, or if they had been subjected to fraudulent manipulation, they possessed no evidential value. Therefore a preliminary investigation became essential in order to decide, not who was elected, but if this evidence tendered by the contestor in support of his claim could be admitted. This preliminary question was not different from innumerable others of analogous character constantly arising in the course of trials of questions of fact, and that it had no place in the pleadings, and no effect whatever to enlarge the issues, is too obvious to require further comment.

It is said that the record fails to note a specific objection to the reception in evidence as genuine ballots of the papers produced as such. The parties examined and cross-examined many witnesses and filled many pages of the record with testimony bearing upon the authenticity of the returns from Americus township in all respects as if some serious question regarding them had arisen. The record bears internal indications that the contestor was fully aware of the point toward which the investigation tended. He introduced evidence which to the mind of this court strongly supported the proposition that the returns were uncorrupted. Even if the contestee interposed no objection the contest court was not obliged to count spurious returns. The action of that court was clearly described in its written findings, and accident and surprise are not argued as grounds for a new trial. Therefore the parties are bound in all respects as if the record contained the formal verbal expression which the contestor insists should have been employed.

The objection that the contestee waived all questions relating to the identity and trustworthiness of the ballots from Americus township is not sustainable. If the same rule were applied to the contestor which he invokes against the contestee, the matter could not be considered. The objection of waiver now made was not urged upon the trial court. It is not necessary,

Moorhead v. Arnold.

however, to rest a decision upon such narrow ground. The contestor makes no attempt to show that he was injured by the reopening of the case. He asked for no delay, claimed no change in circumstance or modification of condition rendering the inquiry prejudicial, produced witnesses in his own behalf, and participated in the proceeding until he voluntarily rested. Nor is there any element of estoppel in the case. The contestor was not induced to give up any rights on account of what the contestee did. Besides this, the public had an interest in the contest which the rival claimants to the office could not barter away. Arnold and Moorhead could not bind the contest court by an arrangement that one of them should be elected by a canvass of unidentified returns, and the court was not obliged to rest under the imputation that its findings were based upon a count of illegitimate ballots. It had the right to demand the production of further evidence if it saw fit, and to open the proceedings for that purpose. Upon the suggestion to it of suspicious facts it was not only authorized, but was under obligation, to take the steps necessary to ascertain the truth.

The propriety of the court's conduct in opening the case is not to be determined by the result of the hearing, and the contestor really has no substantial complaint to make except that the court found against what he believes to be the weight of the evidence. If his position upon that subject be correct, the record is such that under the established rules of law this court can grant no relief. Therefore, the judgment of the district court is affirmed.

All the Justices concurring.

KATE YOUNG *et al.* v. W. H. BIGGER.

No. 14,498. (84 Pac. 747.)

SYLLABUS BY THE COURT.

1. **EJECTMENT—Partial Recovery—Costs—Denial of Plaintiff's Right Need Not be Alleged.** Where a petition in ejectment alleges a full title, and the answer includes a general denial, coupled with the statement that the defendant owns only a fractional interest in the property and has no information regarding the ownership of the remainder, the plaintiff, upon proof of partial title, is entitled to a proportionate recovery and to a judgment for his costs, such a case not being within the contemplation of the code provision requiring a tenant in common in suing a cotenant for the possession of real estate to allege that the defendant has denied his right.
2. ——— **Sufficiency of the Evidence.** The evidence examined and held not to support the judgment.
3. **TENANCY IN COMMON — Payment of Taxes by a Cotenant — Lien.** The owner of an undivided interest in real estate who is not in receipt of any income from it, and who has not ousted his cotenant, is entitled upon paying taxes on the entire property to a lien for the amount paid in excess of his proper proportion, which may be enforced against his cotenant's grantee who takes title by a quitclaim deed.

Error from Wyandotte court of common pleas;
WILLIAM G. HOLT, judge. Opinion filed February 10,
1906. Reversed.

Thomas J. White, for plaintiffs in error.

Keplinger & Trickett, for defendant in error.

The opinion of the court was delivered by

MASON, J.: W. H. Bigger sued Kate and Nannie Young to recover the possession of a tract of land, and for mesne profits. The plaintiff's petition was general in form, and claimed a complete title. The answer included a general denial, coupled with a statement that the defendants owned an undivided nine-twentieths of the land and had no information as to who

owned the remaining interest. The plaintiff recovered a judgment for the possession of eleven-twentieths of the tract, for \$132 as his share of the rental value for twenty months, for \$55.15 on account of taxes paid on the entire property, and for costs. The defendants prosecute error.

Plaintiffs in error contend that the form of the plaintiff's petition was fatal to his recovery in this action because of the requirement of section 597 of the civil code (Gen. Stat. 1901, § 5084), which reads:

"In an action by a tenant in common of real property against a cotenant, the plaintiff must, in addition to what is required in section 595, state in his petition that the defendant either denied the plaintiff's right, or did some act amounting to such denial."

The contention is not well founded, for the reason that the plaintiff did not sue as a tenant in common, but as one having complete title to the property. That his evidence failed to support his claim in its entirety did not affect his right to recover the interest to which he established his title. (*Gatton v. Tolley*, 22 Kan. 678.) The defendants, by including in their answer a general denial, made an issue upon the question whether the plaintiff had a right to any part of the property, and, the proof being against them, they were properly taxed with the costs. The fact that their pleading only claimed title for themselves to nine-twentieths of the land, and recited that they had no information concerning the ownership of the remaining interest, has no bearing on the matter. Their denial of plaintiff's claim was no less effective because they avowed ignorance of the real fact, or because they asserted only a partial title for themselves. Moreover, there was some evidence tending to show that before the bringing of the action they had asserted an exclusive right of possession as against the plaintiff.

The evidence showed that in 1882 W. E. Winner,

Young v. Bigger.

having then a full title to the land, conveyed an undivided eleven-twentieths to E. H. Allen. A tax deed to the remaining nine-twentieths, the validity of which is not assailed, was issued to Robert Young in 1895, and the title so created passed to the defendants in 1897. On October 6, 1903, Winner executed a warranty deed to the entire tract to the plaintiff, but the instrument passed nothing, for the grantor had already conveyed away eleven-twentieths of his interest and the tax deed had extinguished his title to the remainder. On October 20, 1903, Allen quitclaimed his eleven-twentieths to the plaintiff. On November 18, 1902, a tax deed for the whole property was issued to B. G. Horton, who quitclaimed to the plaintiff on November 4, 1903. This deed was held to be invalid as a conveyance of title. It results from this evidence that at the time the action was brought the plaintiff owned eleven-twentieths of the land and the defendants nine-twentieths. The court so found, and the correctness of the finding is not challenged. The only remaining matters of controversy relate to the money awards.

The action was brought December 3, 1903. The trial was completed and the cause submitted to the court July 18, 1904. The decision was announced and judgment rendered November 19, 1904. The court found that the plaintiff was entitled to recover \$132 as his proportionate share of the rent for twenty months. This finding seems to be based upon evidence of the reasonable rental value of the property. The plaintiffs in error claim that they were tenants in common who had not ousted their cotenant, and were only liable for a share of the rents actually received. In the brief of the defendant in error it is said:

"We recognize the rule that a party can only be liable for the amount of rents actually received, if that amount be shown. . . . It is not disputed that Young was in possession and rented and received the rent."

We have made no examination of the evidence to determine whether the case is one in which the defendants might be chargeable with the reasonable rental value of the property irrespective of the amount actually received. We interpret the language just quoted as an admission that it is not. Our attention is not called to any part of the evidence where it is shown that the defendants received any rent whatever. In such search of the record as we have been able to make we find none, and therefore conclude that upon the plaintiff's own theory the finding complained of was erroneous. The finding also appears to lack support from another standpoint. No explanation is offered of the period for which a recovery of rents was allowed. Plaintiff's title accrued, as has been stated, October 20, 1903. The judgment was rendered thirteen months later. The tax deed under which the plaintiff claimed, but which was held to convey no title, was issued twenty months before the time the cause was submitted, and it may be that through some inadvertence, such as confusing the date of the tax deed with that of Allen's deed to the plaintiff, this period was assumed to be that for which the defendants should be held accountable for rents.

The court allowed the plaintiff a lien upon the defendants' interest in the property for a proportionate amount of the taxes, the payment of which was evidenced by the tax deed that was held to be invalid. The defendants complain of this on the ground that inasmuch as the plaintiff was a part owner of the property when Horton conveyed to him he was disqualified to acquire a tax title, that his attempted purchase of one operated as a redemption, and that he cannot take advantage of the statute requiring the reimbursement of the holder of a tax deed which is set aside on account of defects. There was evidence, however, that the plaintiff really bought the tax title before he had any interest in the property, although the deed in consummation of the purchase was not

Young v. Bigger.

made until after he received the deed from Allen. It will not be necessary to determine the questions thus suggested. The defendants concede that the plaintiff was entitled to a lien on their interest in the land as for taxes paid, but say that he could not enforce it in this action because he had not pleaded a claim for contribution. We think no possible prejudice resulted to the defendants from the manner in which this matter was brought to the attention of the court, and that no error was committed in respect of the allowance made to the plaintiff for taxes paid.

The final error assigned is based upon the refusal of the court to allow the defendants to charge against the plaintiff a part of the taxes which they had paid upon the entire property before he acquired any interest in it. The taxes paid by the defendants upon the part of the property owned by Allen gave them a lien upon it, as against him. (17 A. & E. Encycl. of L. 686.) Bigger, when he bought from Allen, received only a quitclaim deed. He therefore stood in the shoes of the grantor. He acquired no higher right than Allen had had, and took the property charged with this lien. There is no showing that when these taxes accrued or were paid the defendants had ousted their cotenants or were in the receipt of any income from the property. We therefore think the court erred in not allowing the defendants credit for the taxes they had paid in excess of their due proportion. The judgment is reversed, and a new trial ordered.

All the Justices concurring.

In the Matter of the Disbarment of C. E. ELLIOTT.

No. 14,582. (84 Pac. 750.)

SYLLABUS BY THE COURT.

73	151
73	632
73	760

73	151
178	156

1. **EVIDENCE—*Privileged Communication—Requisites.*** In order for a communication from a client to his attorney to be confidential and to impose upon the attorney the duty of not disclosing the same it must be of a confidential character, and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of confidential disclosure.

2. ——— ***Attorney and Client—Publication of Communication by Client.*** An answer which has been prepared for the purpose of being filed by or on behalf of the client, and which has been read by the notary, with the consent of the client, and the substance of which has been given by the client to a newspaper reporter and published, and which answer has been shown by the client to, and—with client's consent—read by, an attorney appearing against said client in the proceeding in which it was to be filed, and the substance of which answer has been incorporated into a petition by the client against his attorney and filed in another action, is not such a confidential communication.

3. **ATTORNEYS—*Disbarment Proceeding—Limitation of Action.*** While there is no statute of limitations which is technically applicable to a disbarment proceeding, yet where the alleged misconduct set forth in a charge is shown to have occurred more than thirteen years before the charge is filed in this court, and it appears that proceedings to investigate the occurrence were instituted soon thereafter and proceeded so far that an accusation was prepared and the accused made known his defense thereto, and that thereupon the district court having jurisdiction, and the members of the bar thereof, dropped further proceedings, and thereafter the judge of that court and the members of the bar recognized the accused professionally and socially, this court will not consider such charge. It is at least stale.

Original proceeding in disbarment. Opinion filed February 10, 1906. Accused acquitted.

W. P. Hackney, for the accuser:

Stanley, Vermilion & Evans, and *Gleed, Ware & Gleed*, for the accused.

73	151
82	838
82	839

The opinion of the court was delivered by

SMITH, J.: In this proceeding this court is the trier of the facts involved, as shown by the evidence, as well as of the questions of law presented. We must weigh the evidence—must determine between conflicting statements what is most probably the truth. The evidence is presented in many voluminous depositions and exhibits thereto attached; so we have not the opportunity of a jury or of the ordinary trial court of observing the appearance and bearing of the witnesses and their manner of testifying, which aids so largely in determining their credibility.

The history, therefore, so far as it is disclosed by the evidence, of the accuser and of the accused and other witnesses, and especially of their relations to this proceeding, becomes of more than usual importance, as does also the *animus* of the accuser, disclosed by the briefs. The following is a general outline of their history, as shown by the evidence:

The accused was admitted to the bar in Illinois in 1882, and practiced law in that state till 1885, when he came to Kansas and settled at Wellington, where he has ever since practiced his profession. It is conceded by the prosecution, and testified to by his associates, that he had for nearly twenty years before the filing of the charges in this proceeding been prominent in the practice of his profession, and it does not appear that his integrity had theretofore been questioned, except in the matter set forth in a supplemental charge alleging an attempt to bribe Judge Ray in 1891, to which we will recur.

The accuser, Cleo D. Burnette, was admitted to the bar in 1895, and after serving as justice of the peace and probate judge went into partnership with the accused in 1900. His ability seems to have been well recognized, and it does not appear that his integrity was ever questioned until the genuineness of a letter copied in the letter-book of Elliott & Burnette, under

date of May 31, 1902, was disputed. He was found guilty of forging this letter, and disbarred by the district court of his county in 1903. He removed to California soon after his disbarment to recuperate his health, but returned after a residence there of some months, and in June, 1905, filed the charges in this proceeding.

A reading of the testimony of the accuser and the accused impresses one with the apparent frankness and unevasiveness of the accused in his answer, and in giving his testimony, while the accuser in one part of his deposition depicts himself as being, for a considerable period of time, in such a condition of mind as to be practically unconscious of what took place in his presence and unaccountable therefor, and in another part he recites, to the minutest details, events which he says occurred within the same period, and in connection with the very acts for which by reason of his mental condition he claims to be unaccountable. By reason of this we have been unable, where a criminal fact depends upon the assertion thereof by the accuser alone and the denial thereof by the accused, to find the existence of the fact established by the clear and satisfactory evidence requisite to sustain a charge of this character, which is at least *quasi-criminal*. (*Peyton's Appeal*, 12 Kan. 398, 405.)

The accusation in this case contains fourteen separate charges:

(1) The attempt by letter to coach and procure a witness to falsify by denying an existing fact. We think the weight of the evidence is adverse to the charge.

(2) Secreting and withholding a case-made. It is shown and admitted that the accused did withhold a case-made for a day and two nights from another attorney entitled to the possession of it. We fail to discover, however, that any fraud or wrong was intended or accomplished thereby.

(3) That the accused perjured himself by testifying

that a certain answer was sworn to by Burnette. The answer had been seen by the accused, was signed by Burnette, and was duly certified as sworn to by a well-known notary public. The most that can be said is that the accused swore to a conclusion reached in a legal manner, and did not know the fact from the evidence of his own senses. This was not perjury, if he believed the fact to exist, but simply incompetent testimony.

(4) Misconduct in the Smith divorce case. We find no fact in this case that should disbar an attorney. The contract was not champertous.

(5) Blackmailing Stevens to extort money from him. This charge rests entirely on the evidence of Stevens, and the denial of the most important parts by the accused. No denial, however, was necessary. If true, the story makes out a doubtful case of attempted blackmail. But the witness discredits himself. "I don't remember," given in answer to very numerous questions calling for facts which appear to have been necessarily within his knowledge, is the common cloak of a smooth prevaricator. If the memory of this witness is as poor as his cross-examination indicates, it would be quite unsafe to base an important finding of fact upon it.

(6, 7, 8, and 11) These charges all relate to the concoctions of whisky and morphine claimed to have been found in the accused's desk in the office of Elliott & Burnette. It is claimed both of them drank from a bottle in the desk at different times, and that by reason thereof Burnette became almost a physical and mental wreck. The charge is most serious—a charge of poisoning. If the death of Burnette had ensued, and if the concoction were shown to have been the cause thereof, and if it were shown that the same had been administered by Elliott, or that the poison was by Elliott put in a place under such circumstances that Burnette would probably swallow it, with a design on Elliott's part that he should so take it, the crime of

In re Elliott.

murder in the first degree would be fully established. If the facts are as claimed, and the concoction was of the deadly character sought to be proved, the crime is lower in grade only because death did not ensue; but the same moral turpitude is involved.

What is the proof to establish this grave charge? Elliott testifies that he had bought morphine in the town (Wellington), and that he told Burnette so, and also told him that he (Burnette) never got any of it. This was after Burnette returned from California, and Burnette does not seem to have denied the statement, at least when made. Burnette also testifies that he did not buy the morphine for himself. Elliott denies that he gave or furnished to Burnette such a concoction or caused him to drink the same. Burnette testifies that after the filing of the disbarment proceeding against him both he and Elliott were under the influence of drugs and whisky nearly every day. For what length of time he does not say, nor does he at any time say that Elliott induced him or asked him to drink. The identity of the bottle containing the liquid analyzed by Doctor Mochel with the one taken from Elliott's desk is quite well established, but the evidence of the identity of the contents thereof is not satisfactory. According to analysis and evidence of Doctor Mochel, if Burnette's testimony as to the frequency of their drinking be true, both Elliott and Burnette should be dead. Burnette's evidence does not fix the responsibility of the drinking any more on Elliott than upon himself. Even when pressed to do so he does not say Elliott induced him to drink, or even that they drank together, but says "we had been drinking it at the office."

Nor are we satisfied that Burnette's physical and mental ill health resulted from the use of the concoction of whisky and morphine, as alleged. The testimony of his attending physicians tends to disprove rather than to establish this theory. In short, we do

not find any of these charges sustained by the evidence.

(9) This is really a double charge: (1) A conspiracy between Elliott and three other lawyers in preparing the answer of Burnette in his disbarment proceeding, knowing the same to be false; (2) that Elliott, having acted as attorney for Burnette in the disbarment proceeding, produced a copy of this answer in court, offered to identify it, and when it was ruled out as a privileged communication handed it to a member of the committee appointed to prosecute. The first branch of this charge is utterly refuted by Burnette's own letters from California, and a number of witnesses, if not by his own evidence. The facts alleged in the second part of the charge are fully established as charged. The question then arises, Was the answer a privileged communication? We answer this question in the negative.

"In order for a communication from a client to an attorney to be within the rule excluding evidence thereof on the ground of public policy, it must be of a confidential character, and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of a confidential disclosure." (23 A. & E. Encycl. of L. 67, and cases there cited.)

The only purpose of preparing this answer evidently was that it be filed in court in the case in which it was entitled and thus made public. Burnette had evidently not treated it as private, as he had been instrumental in having the substance of it printed in a newspaper, had requested, or at least allowed, the notary before whom he verified it to read it. He had previously presented it to the very man to whom Elliott is alleged to have presented it, allowed him to read it, and not only urged that he be allowed to file it in the same case in which the breach of professional secrecy is charged but also procured others to solicit that privilege for him. He had also made the answer public by

setting forth the substance of it in a petition for damages against Elliott in the same court.

(10) That Elliott conspired with others and advised Burnette to refuse to testify on August 6, 1903. If after Burnette had recovered his physical and mental health he had testified when called upon as a witness in court regarding the facts of which he had refused to speak months before, we might conclude from the circumstances that he had been influenced by some one in making such refusal. Instead, however, he again refused to speak, and at a time when it cannot be claimed that he was under the influence of Elliott or his alleged coconspirators. This circumstance, in the conflict of evidence, lends preponderance to the negative of the charge.

(12) That for the year previous to the filing of these charges the accused had been an habitual drunkard. The evidence shows that Elliott's conduct in the respect charged has been far from exemplary—in fact, has been such at times as should subject him to severe criticism. Yet the evidence of the successive judges before whom he has practiced law for many years shows only one instance in which Elliott has appeared in court in such a condition of intoxication as to attract attention thereto, or to affect his business capacity. No client of his, unless it be Burnette, has been produced to testify that his business has been neglected, or suffered in any way by reason of Elliott's intemperance, or who has testified to any facts that would justify such conclusion. True it is that a man is required to show upon his admission to the bar that he is of good moral character. His license to practice after he is admitted, however, will not be revoked on account of objectionable personal habits until it is shown that such habits have rendered him unable to attend properly to his duties as a lawyer, or have rendered him unworthy of the great trust and confidence generally accorded to the members of the profession, or that such habits have become so bad as to scandalize

his profession or the courts in which he practices. We do not think the evidence sufficient to establish either of these conditions in this case.

(13) The testimony falls so far short of sustaining this charge that we pass it without discussion.

(14) Nearly fourteen years before the filing of these charges Elliott had a conversation with Judge Ray relating to a sum of money which had been deposited to indemnify sureties on bonds for the appearance of certain defendants in criminal cases then pending in Judge Ray's court. From his understanding of the proposition the judge was justly very indignant. He made a statement in open court soon thereafter, and appointed a committee of members of the bar to draft a charge against Elliott, which was done. Elliott thereupon made a statement of his understanding of the conversation and his purpose therein, which statement differed radically from the judge's version. Elliott's statement seemed plausible, and apparently was given credence by the court and members of the bar, as the proceeding was dropped; and Judge Ray, as well as the members of the bar conversant with the charge, thereafter recognized Elliott, both professionally and socially, as no men of right thinking could have done if they believed Judge Ray had not been mistaken in his version of the matter.

Conceding there is no statute of limitation applicable to a charge of this nature, it must at least be said that it is very stale; and in this *quasi*-criminal proceeding the action of the court, and the many years' acquiescence therein of the members of the bar to whom the alleged facts were made known at the time, should be regarded as an acquittal of Elliott of this charge. At least, the claim is so stale, and the circumstances so strongly indicate that both the bench and the bar most intimately associated with the accused concluded, after hearing the version which he gave of the conversation, that the judge was mistaken in his version thereof, that we decline to reconsider the matter now.

We have, we may say, examined with care each of the numerous charges in succession, and the evidence offered in support of the same and in rebuttal, and our conclusion is that no act of misconduct charged has been so clearly established by the evidence as to justify the disbarment of the accused. It is not a question between the accuser and the accused, but between the accused and the public. If the accused has been shown to be guilty of such misconduct that the public should be protected from the implied recommendation for integrity with which he is armed as a member of the bar, that recommendation should be withdrawn and he should be disbarred. On the other hand, his means of livelihood should not be forfeited, and the honorable position to which his ability and a life of toil have entitled him should not be wrested from him, and his declining years embittered with disgrace, unless these criminating charges or some one of them have been clearly established.

Disposed as is this court to encourage and assist in maintaining a high standard of integrity in the profession of which we are members, and realizing as we do that no profession, except perhaps that of the clergy, demands a cleaner private life or a keener sense of professional honor than does that of the lawyer, we are unable under the evidence in this case to impose this great forfeiture and penalty upon the accused. He is therefore acquitted.

All the Justices concurring.

THE STATE OF KANSAS V. F. T. APPLETON.

No. 14,661. (84 Pac. 753.)

SYLLABUS BY THE COURT.

1. **CRIMINAL LAW**—*Grounds for a New Trial.* Under section 210 of the criminal code (Gen. Stat. 1901, § 5652) new trials may be awarded in criminal cases upon the grounds for which new trials may be granted in civil cases, if such procedure is not inconsistent with other provisions of the criminal code.
2. **PARTIES**—*Action against the State—Consent.* The state cannot be sued in its own courts except with its own consent, clearly conferred by act of the legislature.
3. ——— *Proceeding to Set Aside a Judgment of Conviction.* Section 210 of the criminal code (Gen. Stat. 1901, § 5652), authorizing the awarding of new trials for like causes and under like circumstances as in civil cases, and section 310 of the civil code (Gen. Stat. 1901, § 4758), providing for instituting a proceeding to obtain a new trial within one year after final judgment has been rendered, do not authorize the commencement of a proceeding against the state by one adjudged guilty of a public offense to set aside the judgment of conviction and obtain a new trial.

Appeal from Rush district court; CHARLES E. LOBDELL, judge. Opinion filed February 10, 1906. Affirmed.

C. C. Coleman, attorney-general, and J. W. McCormick, county attorney, for The State.

David Ritchie, and G. R. McKee, for appellant.

The opinion of the court was delivered by

JOHNSTON, C. J.: F. T. Appleton was convicted of murder in the first degree. A motion for a new trial was denied, judgment was rendered, and an appeal was taken to this court, where the judgment was affirmed. (*The State v. Appleton*, 70 Kan. 217, 78 Pac. 445.) Afterward, and just within a year from conviction, he filed a petition asking for a new trial on the grounds that two jurors who tried him were prejudiced against him, although upon an examination of

their qualifications they answered that they were free from bias or prejudice, and that since the trial some important testimony had been discovered which could not have been sooner discovered by him. On this petition a summons commanding the sheriff to notify the state and county attorney was issued, and a copy of it was delivered to the county attorney. He appeared specially and moved the court to quash the summons for the reason that the court had no jurisdiction of the defendant, or of the subject of the proceeding; that the state, being a sovereign power, could not be sued or brought into court by service of summons, and that Appleton had no legal capacity to sue. The court granted the motion and dismissed the proceeding, and of this ruling Appleton complains.

Although his motion for a new trial, filed immediately after verdict, in pursuance of section 275 of the criminal code (Gen. Stat. 1901, § 5713), was denied, he insists that he was entitled to avail himself of the provisions of section 310 of the civil code (Gen. Stat. 1901, § 4758), which authorize a proceeding to obtain a new trial after the term at which the trial was had and within a year after final judgment. The claim is based on section 210 of the criminal code (Gen. Stat. 1901, § 5652), which provides that "verdicts may be set aside and new trials awarded on the application of the defendant; and continuances may be granted to either party in criminal cases for like causes and under the like circumstances as in civil cases." It is argued that this provision does not apply to new trials of criminal cases for two reasons: One is that the clause, "for like causes and under the like circumstances as in civil cases," applies only to continuances, and has no application to the setting aside of verdicts or the awarding of new trials. The punctuation of the section, as it is printed in the General Statutes of 1901, where there is a separating semicolon after the word "defendant," is said to support this view. The section

was enacted in 1855 (Stat. of Kan. Ter., ch. 129, art. 6, § 17), and as then printed a comma, instead of a semicolon, was used after the word "defendant," and it appears that the same section was so punctuated in the revisions of 1859 (Kan. Stat. 1859, ch. 27, § 189), 1862 (Comp. Laws 1862, ch. 32, § 189) and 1868 (Gen. Stat. 1868, ch. 82, § 210). Punctuation of a statute is not controlling, and certainly the changed punctuation made by the printer or compiler in the recent revision would hardly be a safe guide for the interpretation of this statute. Taking the section as it was punctuated when it was enacted, or laying aside the matter of the punctuation and taking the structure of the sentence, the natural import is that the last clause of the section applies to verdicts and new trials as well as continuances. Unless the first clause of the section is modified by the last the first would seem to be superfluous, and under the general rule a construction which gives effect to statutory language is preferred over one which would make it nugatory and useless. The purpose of the legislature appears to have been to carry into the criminal code the provisions of the civil code relating to the causes and circumstances for and under which verdicts might be set aside, new trials awarded, and continuances granted, so far as they may be applicable in criminal cases.

It is further contended that section 210 of the criminal code (Gen. Stat. 1901, § 5652), which purports to borrow some of the provisions of the civil code, should not apply because section 275 of the criminal code (Gen. Stat. 1901, § 5713) specifies the causes for which a new trial may be given. It appears that section 210 is the earlier provision, it having been enacted in 1855 (Stat. of Kan. Ter., ch. 129, art. 6, § 17), while section 275 was not passed until 1859. (Kan. Stat. 1859, ch. 27, § 258.) In 1859 section 210 was reenacted and placed in the criminal code with section 275, and has been in every revision of the statutes and treated as an effective provision since 1859. The causes for a new

The State v. Appleton.

trial specified in section 275 are limited, and hardly meet the exigencies of an ordinary case. One illustration of its incompleteness will suffice. It provides that a new trial may be awarded for receiving unauthorized or illegal testimony, but does not authorize a new trial for the exclusion of competent testimony offered in behalf of the defendant. It has been the uniform practice from the beginning to allow new trials in criminal cases upon this ground, and in fact for every cause for which a new trial may be granted in civil cases. So it was said, in *The State v. Bogue*, 52 Kan. 79, 84, 34 Pac. 411: "We also think section 210 of the criminal code authorizes the granting of new trials for like causes as in civil cases, and that section 275 in no way prejudices the defendant's right in that particular."

It is true that some language was used by Chief Justice Doster, in *Asbell v. The State*, 60 Kan. 51, 55 Pac. 338, suggesting a contrary view, but as will be observed it was found unnecessary to determine whether new trials could be awarded in criminal cases upon the same grounds as in civil cases, and therefore no decision of the question was made, and the accepted rule was not disturbed.

While section 210 of the criminal code enlarges the grounds upon which a new trial may be awarded, neither that section nor section 310 of the civil code, singly or taken together, have the effect to authorize the institution of a proceeding against the state. The last-named section provides that where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after, the term at which a trial was had a proceeding may be brought to obtain another trial.

The proceeding contemplated by that section is in a sense a new one, brought after judgment is rendered and the parties are no longer in court. To institute the proceeding a petition must be filed and a summons issued, as is done in the commencement of a civil action. There may be actual or constructive service of the sum-

mons, the same as in ordinary cases, and unless a party is brought into court in the proper manner no jurisdiction is obtained. The case is placed on the trial docket, witnesses are examined in open court, and depositions may be taken as in other cases, and it proceeds throughout as a new proceeding. While it brings up for reconsideration the questions involved in the former case, it is distinct from that case, and the parties must be brought into court again on original process before jurisdiction to grant the relief asked is acquired.

A prerogative of sovereignty which belongs to a state is that it cannot be brought into court to answer claims made against it unless express consent to that end has been given. The power to give consent rests in the legislature, and plaintiff has not called our attention to any statute authorizing a suit against the state. It is contended here, as it was in *Asbell v. The State*, 60 Kan. 51, 55 Pac. 338, that section 210 of the criminal code, in connection with section 310 of the civil code, furnishes sufficient authority for bringing the state into court upon a summons issued at the instance of one who has been convicted of an offense. There is nothing in these sections indicating a legislative purpose of abrogating the prerogative of sovereignty and the giving of consent that the state may be sued in either civil or criminal cases. Courts cannot resort to forced constructions or questionable implications to find such consent. The rule is that as statutes giving the power to sue the state are in derogation of a sovereign power they should be construed strictly. As was said in *Asbell v. The State*, *supra*:

"To compel a state, upon theories of doubtful statutory interpretation, to appear as defendant suitor in its own courts, and to litigate with private parties as to whether it had abnegated its sovereignty or its right of exemption from suit, would be intolerable. . . . In its grace and favor it may waive its sovereign right of exemption, but the waiver must be made in express terms, or at least in terms so clear and unambiguous

as necessarily to force upon the mind the implication of waiver." (Page 55.)

Whether the proceeding brought by plaintiff is regarded as a common-law writ of *coram nobis*, or a statutory proceeding to obtain a new trial, the result must be the same, as the legislature has never in clear terms authorized the institution of such a proceeding against the state.

The judgment of the district court is therefore affirmed.

All the Justices concurring.

THE CITY OF OTTAWA V. MARY JOHNSON.

No. 14,675. (84 Pac. 749.)

SYLLABUS BY THE COURT.

APPEAL BOND—Signed by Defendant Alone—Validity. Where a defendant upon conviction in police court offers an appeal bond signed only by himself, and the police judge approves it and discharges him from custody, it is error for the district court to dismiss the appeal because the bond lacks the signature of a surety, although the statute provides that no appeal shall be allowed unless the appellant enters into a recognizance with good and sufficient security, to be approved by the police judge, for his appearance in the district court to answer the charge against him.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed February 10, 1906. Reversed.

George D. Rathbun, for appellee.

Gamble & Costigan, for appellant.

The opinion of the court was delivered by

MASON, J.: On May 29, 1905, Mary Johnson was convicted in the police court of the violation of an or-

73	165
76	718
73	165
82	80

dinance of a city of the second class. On the same day, for the purpose of effecting an appeal to the district court, she presented a bond for her appearance at the next term thereof, signed by herself but by no other person. The police judge indorsed his approval upon the bond, and the defendant was discharged from custody. At the next term of the district court, in September, she appeared for trial, and the prosecution moved to dismiss the appeal upon the ground that the bond, being signed by no one except the plaintiff, was void. The motion was allowed, and the defendant upon an appeal to this court presents the single question of the correctness of that ruling.

In behalf of the appellee it is argued that the statute (Gen. Stat. 1901, § 1041) makes it a condition of the allowance of an appeal from a conviction in police court that the defendant shall enter into a recognizance, "with good and sufficient security to be approved by the police judge," for his appearance in the district court; that the word "security" as there used means "surety"; and that the bond given in this case, not being signed by a surety, failed to comply with the statute, and was therefore an absolute nullity and conferred no jurisdiction upon the district court. To this we cannot agree. It was held in *McClelland Bros. v. Allison*, 34 Kan. 155, 8 Pac. 239, that an appeal bond approved by a justice of the peace in a civil case, signed only by the parties against whom the judgment had been rendered, was not entirely void, and might be amended, although the statute (Gen. Stat. 1901, § 5354) required that it should be signed by "at least one good and sufficient surety." It is true that there is express statutory authority (Gen. Stat. 1901, § 5361) for renewing an appeal bond in a civil case where the surety is insufficient or the undertaking is defective in form or amount, while the criminal code contains no corresponding provision. In the case cited the statute permitting such renewal was referred to, but the conclusion reached involved a holding that the bond there

under consideration, although lacking a surety, was not absolutely void, and a distinction was noted in that regard between such a bond and one running to the wrong obligee, which was decided in *Lovitt v. Wellington & Western Rld. Co.*, 26 Kan. 297, to be without effect for any purpose.

It is said, and there appears to be no authority to the contrary, that "although the statute provides that recognizances shall be executed by two sureties, a recognizance is not invalid because executed by one only." (3 A. & E. Encycl. of L. 683. See, also, 2 Cyc. 922.) Upon the same principle it seems clear that a recognizance upon appeal, entered into by a defendant without any surety whatever, although it fails to meet fully the requirements of the law, is not utterly void, but if approved and acted upon is effective to bind the signer and confer jurisdiction upon the appellate court.

No question is presented regarding the right of the district court to require the giving of a further recognizance.

The judgment is reversed, with directions to deny the motion to dismiss.

All the Justices concurring.

THE KANSAS CITY, OUTER BELT AND ELECTRIC RAILROAD COMPANY V. THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF KANSAS *et al.*

No. 14,896. (84 Pac. 755.)

SYLLABUS BY THE COURT.

1. **RAILROAD COMMISSIONERS—Jurisdiction Does Not Extend to Electric Railroads.** In giving the board of railroad commissioners supervision over railroads operated by steam the statute by implication denies them power over railroads operated only by electricity.
2. ——— **Statutory Definition of "Railroad Company"—Road Operated by Steam.** In defining the term "railroad company" as used in the railroad commissioners law (Gen. Stat. 1901, § 5997) to mean a company whose road is operated by steam, the statute forbids such term's being construed to include a company owning a road operated only by electricity, except where such intention may be expressly manifested.
3. ——— **Determination of Applications for Permission to Cross Tracks of Other Roads.** The section of the statute which gives the board of railroad commissioners authority to hear and determine the application of a railroad company for permission to cross its track "with any other railroad upon the grounds of such other railway corporation" (Gen. Stat. 1901, § 5974) does not apply to a case where a railroad company seeks to cross the track of a railway company whose line is operated entirely by electricity.
4. ——— **Electric Railroad—Permission to Use Steam—Jurisdiction of Commissioners.** A line of railway which is so constructed as to be operated only by electricity, and which is in fact so operated, is not a railroad operated by steam within the meaning of the railroad commissioners law, even although it is owned and managed by a corporation whose charter permits the use of steam as a motive power.
5. ——— **Application by Steam Railroad to Cross Electric Railroad.** The board of railroad commissioners has no jurisdiction to entertain an application by a railroad company for leave to cross its track with that of a railway company using only electricity as a motive power.

Original proceeding in mandamus. Opinion filed February 10, 1906. Peremptory writ denied.

Railroad Co. v. Railroad Commissioners.

John A. Eaton, and H. L. Alden, for plaintiff.

Carr W. Taylor, and C. F. & S. D. Hutchings, for defendants.

The opinion of the court was delivered by

MASON, J.: The Kansas City, Outer Belt and Electric Railroad Company, which for convenience will in this discussion be designated as the railroad company, is a corporation engaged in the construction of an ordinary railroad, to be operated by steam. The Kansas City Western Railway Company, which will be called the electric railway company, is a corporation engaged in the operation of what it describes as a street-railway, extending from Kansas City to Leavenworth. The former company, desiring to build its road so as to cross that of the latter at a point within the city of Kansas City, Kan., not upon a street or other public place, made an application to the board of railroad commissioners asking that it investigate the matter and make an order permitting such crossing and fixing the manner in which it should be made. The board dismissed the application upon the ground that it had no jurisdiction. The railroad company now seeks by mandamus to compel the board to entertain its application and make a decision upon the merits. An alternative writ has been issued, an answer filed, and the facts agreed upon.

The plaintiff founds its action upon that part of section 5974 of the General Statutes of 1901 which reads:

"Any railroad company authorized to operate a railroad in this state desiring to cross or unite its track with any other railroad upon the grounds of such other railway corporation shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection; whereupon the board of railroad commissioners shall fix a day for the hearing of such application, and notify the railway corporations interested, at which time, unless further time be granted by the board, the corporations inter-

Railroad Co. v. Railroad Commissioners.

ested shall be heard in regard to the necessity, place, manner and time of such crossing or connection; and upon such hearing either party, or the board, may call and examine witnesses in regard to the matter; and the board shall, after such hearing and a personal examination of the locality where a crossing or connection is desired, determine whether there is a necessity for such crossing or not, and, if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing and the terms upon which the same shall be made and maintained."

The question to be determined is whether the electric railway company is a railroad company within the meaning of this statute. The plaintiff claims that it is. The defendants claim that it is not, for these reasons: (1) That it is engaged in operating a street-railway only, while the statute has no application to any roads but such as for the purpose of the distinction are called commercial railroads, and (2) that it employs only electricity as a motive power, while the statute applies only to railroads operated by steam.

While the word "railroad" in an act of the legislature is ordinarily held not to include a street-railway (*The State v. Cain*, 69 Kan. 186, 76 Pac. 443), this is not an arbitrary and inflexible rule, and where street-railways are within the spirit and purpose of a law, although not expressly named, they have been regarded as covered by the general term "railroad." (For illustrations of both classes of cases, see 7 Words and Phrases Judicially Defined, pp. 5904-5907. See, also, *Railroad Co. v. Jackson*, 70 Kan. 791, 79 Pac. 662.) In the present case it will not be necessary to decide whether the statute invoked by plaintiff was intended to apply to any but commercial railroads, nor whether under the agreed facts the line operated by the electric railway company was strictly a street-railway, which is itself a question not free from doubt. The section from which the foregoing quotation is made is a part

of chapter 286 of the Laws of 1901, section 37 of which (Gen. Stat. 1901, § 5997) reads:

"In construing this act, unless such meaning be repugnant to the context or the manifest intention of the legislature, the term 'railroad company' shall include and be construed to mean any incorporated railroad company, or any express or transportation company or other common carrier, or any railroad-bridge company, or any person or persons, lessee, assignee, trustee, receiver, partnership, joint-stock company, or corporation, engaged wholly, partially, jointly or severally in laying out, constructing, owning, operating, using or maintaining any railroad operated by steam, or any portion or part of such railroad line. The word 'person' shall include persons, partnerships, joint-stock companies, or corporations."

A first consideration of this section naturally creates an impression that its intention and effect is to confine the operation of the law absolutely to steam railroads, which impression is intensified by an examination of section 7 of the same act (Gen. Stat. 1901, § 5967), reading:

"Said commissioners shall have the general supervision of all railroads *operated by steam* within the state, and all express companies, sleeping-car companies, and all other persons, companies or corporations doing business as common carriers in this state; and shall inquire into any neglect or violations of the laws of this state by any person, company or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents or employees thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management with reference to the public safety and convenience."

These two sections are but reenactments of parts of the original act creating a board of railroad commissioners in this state (Laws 1883, ch. 124, §§ 5, 26), which was repealed in 1898 (Laws 1898, ch. 29) and readopted with various changes in 1901. Their lan-

guage was apparently borrowed from an Iowa law passed in 1878. (Laws of Iowa, 1878, ch. 77, §§ 3, 16.) It might be argued that at the time the test of being "operated by steam" was adopted as a means of classifying railroads steam was the only recognized motive power employed for rapid transit, and that therefore the phrase should be interpreted as covering any mechanical force, such as electricity, that afterward came into use for that purpose. This view was taken by the New York supreme court (73 N. Y. Supr. Ct. 366, 21 N. Y. Supp. 1046) of a similar expression occurring in a contract entered into in 1882, but the court of appeals was of a different opinion and accordingly reversed the case. (*P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610.) If the argument were otherwise convincing the failure to modify the language of the sections quoted in 1901, when the entire act was remodeled, must be taken to indicate that notwithstanding the changed conditions since the board of railroad commissioners was first established the legislature was still content to limit its powers to the control of railroads operated by steam.

The plaintiff, however, contends that a close scrutiny of both sections will justify the conclusion that the phrase "operated by steam" is intended to limit the word "railroad" only with respect to its use in the very clause in which it occurs, and that it is not to be regarded as having relation to any other part of the sentence. By this method the construction to be placed upon section 37 (Gen. Stat. 1901, § 5997) might be thus indicated: "The term 'railroad company' shall include and be construed to mean (1) any incorporated railroad company, or (2) any express or transportation company or other common carrier, or (3) any railroad-bridge company, or (4) any person . . . or corporation, engaged . . . in laying out, constructing, owning, operating, using or maintaining any

Railroad Co. v. Railroad Commissioners.

railroad operated by steam." And that of section 7 (Gen. Stat. 1901, § 5967) in this manner: "Said commissioners shall have the general supervision of (1) all railroads operated by steam within the state, and (2) all express companies, sleeping-car companies, and (3) all other persons, companies or corporations doing business as common carriers in this state."

Granting that the interpretation suggested is consistent with the rules of grammar, and even assuming that it would be required by a close adherence to the very letter of the statute, its adoption is forbidden by two considerations: It would manifestly give the law a broader operation than ever could have been intended, and it would entirely destroy the force of the words "operated by steam." It requires no argument to prove or example to illustrate that it was not the purpose of the legislature to vest in the railroad commissioners jurisdiction over all railroad-bridge companies and all transfer companies, or even over common carriers of every sort. If such were the case there could be no occasion for distinguishing between the different classes of railroads. The express and repeated affirmance that the board is to exercise control over railroads operated by steam by the plainest implication denotes that railroads not so operated are excluded from the scope of its duties.

We conclude that the railroad commissioners have no general jurisdiction over a company engaged in the operation of an electric railway; that such a company is not included within the term "railroad company" as ordinarily employed in the statute referred to; and that the language of the section relating to the crossing of railroad-tracks does not manifest an intention to give that part of the law any wider application in this respect.

A final claim of the plaintiff is that the electric railway company is within the control of the board of railroad commissioners by reason of the fact that the

New v. Smith.

charters under which it exists and does business authorize it to employ steam as a motive power, although it in fact has not done so. It is agreed that the road as now constructed is only adapted to the use of electricity; that being true, its owner is not now engaged "in laying out, constructing, owning, operating, using or maintaining any railroad operated by steam," and is not within the terms of the statute.

A peremptory writ is denied.

All the Justices concurring.

EMELIA NEW, AND ROBERT H. CLOGSTON, *as Trustee of Emelia New, a Convict*, v. J. A. SMITH *et al.*

No. 14,306. (84 Pac. 1030.)

SYLLABUS BY THE COURT.

1. PARTIES—*Action to Recover Convict's Estate—Trustee.* An action for the recovery of property belonging to a convict under sentence and imprisonment for a term less than life can only be maintained by a trustee.
2. ——— *Improper Joinder — Demurrer — Surplusage.* Where such an action is brought in the name of the trustee, and the petition states a cause of action in his behalf, the convict being also named as a party plaintiff, the allegations with reference to the convict's right to join as a plaintiff should be treated on demurrer as mere surplusage.
3. PETITION — *Duplicity — Motion to Separate and Number.* When a petition sets up a cause of action in ejectment and another for rents and profits, a motion separately to state and number the two causes of action should be allowed.

Error from Greenwood district court; GRANVILLE P. AIKMAN, judge. Opinion filed March 10, 1906. Reversed.

John Stowell, and *Robert H. Clogston*, for plaintiffs in error.

Rossington & Smith, and *Samuel Barnum*, for defendants in error.

The opinion of the court was delivered by

PORTER, J.: This is a proceeding in error from a judgment sustaining a demurrer to a petition in which is also involved a ruling of the court requiring plaintiffs separately to state and number the different causes of action stated in the petition. The motion was allowed to the original petition, and the demurrer sustained to the amended petition. The subject-matter of the controversy in this action has been before the court in *Smith v. Becker*, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141, and *New v. Smith*, 68 Kan. 807, 74 Pac. 610. The original petition reads as follows:

"In the District Court of Greenwood County, Kansas.

"EMELIA NEW, and ROBERT H. CLOGSTON, as Trustee of Emelia New, a Convict, Plaintiffs,

v.

J. A. SMITH and H. M. BROWN, Defendants.

"PETITION.

"The plaintiff Emelia New is now and has been a convict in the state penitentiary, at Lansing, Kan., since the 25th day of January, 1898, having been sentenced on the 24th day of January, 1898, by the district court of Greenwood county, Kansas, for her natural life, upon a verdict of being accessory to the murder of her husband, Joseph New, who was shot and instantly killed on the evening of October 31, 1897. That afterward, and on the 7th day of January, 1899, the Honorable J. W. Leedy, then governor of this state, commuted her sentence to forty years, in lieu of 'for her natural life,' and the plaintiff Robert H. Clogston is her duly appointed, qualified and acting trustee of her estate, having been appointed by the probate court of Greenwood county, Kansas, on the 2d day of April, 1901.

"Plaintiffs further aver that they have the legal estate and the equitable estate in and to the following-described real estate, to wit: The west-half of the southeast quarter of section fourteen (14), township twenty-seven (27), range nine (9), also the southwest quarter of section fourteen (14), township twenty-seven (27), range nine (9), the same being 240 acres, situated in Greenwood county, Kansas, and are en-

New v. Smith.

titled to the immediate possession of the same; and the defendants unlawfully keep plaintiffs out of the possession of the same.

"Plaintiffs further state that the said defendant J. A. Smith has so unlawfully kept plaintiffs out of said possession for the past three years, and collected and used for their [defendants'] own benefit during said time the rents and profits arising from said real estate, amounting to \$1200.

"Wherefore, plaintiffs pray judgment for the possession of said premises, and for the sum of \$1200 for rents and profits, and for costs and all other proper relief.

EMELIA NEW,

By ROBERT H. CLOGSTON, her Trustee.

JOHN STOWELL and ROBERT H. CLOGSTON,
Attorneys for Plaintiffs.

"ROBERT H. CLOGSTON, *Trustee.*"

The first error complained of is the ruling requiring that the two causes of action be separately stated and numbered. Counsel have argued at some length a question not at all involved, which is, that it is proper to unite in the same action a cause of action for ejectment and one for rents and profits. This is, of course, not denied by any one, but the motion which the court very properly allowed was not directed against the joining of the two causes of action. It was based upon the failure of the pleader separately to state and number them. Section 88 of the code of civil procedure (Gen. Stat. 1901, § 4522) reads as follows: "Where the petition contains more than one cause of action, each shall be separately stated and numbered." It has been held error for the court not to allow a motion of this kind. (*Pierce v. Bicknell*, 11 Kan. 262.)

The amended petition is the same as the original in all respects, except that the cause of action for rents and profits is omitted. The demurrer which the court sustained contains six grounds, stated as follow:

"(1) That the plaintiff Emelia New has no legal capacity to sue.

"(2) That the plaintiff Robert H. Clogston, as trustee of Emelia New, has no legal capacity to sue.

"(3) That several causes of action are improperly joined.

"(4) That the amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against these defendants.

"(5) That the amended petition does not state facts sufficient to constitute a cause of action in favor of Emelia New and against these defendants.

"(6) That the amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff Robert H. Clogston, trustee of Emelia New, a convict, and against these defendants."

It is contended by defendants in error that as all the estate of the convict is vested in her trustee by virtue of sections 5780 and 5781 of the General Statutes of 1901, and as the trustee alone has power to sue, therefore she is without capacity to sue; and, as the trustee can only sue in his own name, he has no capacity to sue jointly with her. It is also urged that the petition sets up two causes of action—one for the convict and one for the trustee. Finally, it is said, under the fourth, fifth and sixth causes of demurrer, that the petition does not state a cause of action in favor of both plaintiffs, nor a cause of action in favor of Mrs. New, nor one in favor of the trustee. We can dispose of all these grounds of demurrer at once. In the General Statutes of 1901 are the following provisions:

"SEC. 2301. A sentence of confinement and hard labor for a term less than life, suspends all civil rights of the person so sentenced during the term thereof, and forfeits all public offices and trusts, authority and power; and a person sentenced to such confinement for life shall thereafter be deemed civilly dead."

"SEC. 5776. Whenever any person shall be imprisoned in the penitentiary for a term of less than his natural life, a trustee to take charge of and manage his estate may be appointed by the probate court of the county in which said convict last resided, or if he have no known place of abode, then by the court of the county in which the conviction was had, on the application of any of his relatives, or any relative of his wife, or any creditor."

"SEC. 5780. Upon taking the oath and filing the bond required by this act, all the estate, property, rights in action and effects of such imprisoned convict shall be vested in such trustee, in trust for the benefit of creditors and others interested therein."

The power of the trustee to maintain an action of this nature is provided for in the following section:

"Such trustee may sue for and recover in his own name any of the estate, property or effects belonging to and all debts and sums of money due or to become due to such imprisoned convict, and may prosecute and defend all actions commenced by or against such convict." (Gen. Stat. 1901, § 5781.)

Under these provisions Mrs. New is the same as civilly dead; she has no capacity to sue or be sued. This is so plain from the statutes that we are disposed to consider all the allegations of the petition by which it is sought to make her a party in any way as mere surplusage, and redundant. The petition therefore is the same as though the words "the plaintiff" in the first line were stricken out, and then there appears a simple recital of the facts in much the same manner as though no attempt had been made to make her a party. This requires rather heroic treatment of the petition, but there can be no question as to the right of the trustee to maintain in his own name the cause of action which he sets up; and there is likewise no possible way in which Mrs. New could be made a party, or set up a cause of action in her own name or jointly with the trustee.

The objection that the amended petition is bad because it is not signed by plaintiff Clogston has no force, for the reason that it is signed by the attorneys for plaintiff, which is all that is necessary under the code. (Code, § 107; Gen. Stat. 1901, § 4541.)

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel. C. C. Coleman, as Attorney-general*, v. THE WICHITA MUTUAL BURIAL ASSOCIATION *et al.*

No. 14,310. (84 Pac. 757.)

SYLLABUS BY THE COURT.

MUTUAL BURIAL ASSOCIATIONS—*Must Comply with Insurance Laws—Injunction.* An association organized for the purpose of securing to each of its members a burial worth \$100, in consideration of stipulated assessments to be paid by such members during their lives, is an insurance association within the provisions of section 3386 of the General Statutes of 1901.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed March 10, 1906. . Reversed.

C. C. Coleman, attorney-general, J. S. West, assistant attorney-general, and Otto G. Eckstein, county attorney, for The State.

Stanley, Vermilion & Evans, for defendants in error.

The opinion of the court was delivered by

GRAVES, J.: This suit was brought by the attorney-general and the county attorney of Sedgwick county, in the name of the state, to enjoin the defendants from carrying on the business being done in the name of the Wichita Mutual Burial Association, for the reason that such business as conducted is contrary to law. The district court of Sedgwick county refused the injunction, and the state comes here on proceedings in error.

It is claimed that this association does an insurance business without being incorporated and without complying with the statute relating to such organizations. The statute alleged to be violated is section 3386 of the General Statutes of 1901, which in part reads:

"It shall be unlawful for any company, corporation or association, whether organized in this state or elsewhere, either directly or indirectly to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this act."

73 179
179 20

It is contended by the defendants that the business carried on by the Wichita Mutual Burial Association is not insurance; that the contracts made by it do not substantially amount to insurance, or in any manner aid therein, and therefore the above statute does not apply thereto.

Whether such business is insurance within the purview of such statute is the sole question presented. The facts have been agreed to, and from them it appears, in substance, that I. W. Gill, an undertaker at Wichita, Kan., organized the defendant burial association upon a plan and scheme specially prepared and copyrighted. The association is not incorporated, and has not complied with the provisions of the statutes of the state relating to insurance. It has no lodge or other place provided for holding meetings or transacting its business. It has no ritual, and no meetings of any kind except upon call of the president, when by him deemed necessary, or when required by the written request of twelve members. It purports to have a president, vice-president, secretary, and treasurer, who constitute a board of control, but I. W. Gill is the secretary and treasurer, and manages and controls the entire business of the association. He collects, handles and disburses the funds, without giving security or being required to account therefor. He is the official undertaker, and has exclusive charge and management of all the burial services that the association furnishes. Officers are elected annually, if necessary. Any person in good health, between the ages of one and seventy years, can become a member. Membership continues while assessments are paid. When payments cease, all rights and what has been paid are forfeited. The right to receive burial benefits continues during the existence of the association.

An assessment of five cents upon members under ten years of age, and of ten cents upon those ten years of age or over, is made as often as necessary to defray the expenses of the association. The only expenses

The State v. Burial Association.

are those included in the burial benefits. Members who pay assessments of ten cents are entitled to a funeral worth one hundred dollars, other members fifty dollars. Each member receives a certificate of membership, executed by the principal officers of the association, which states in substance that the holder is a member and entitled to all the benefits of the organization, as provided by its by-laws. Each member also receives a book in which all assessments are entered and receipted for when paid. The secretary and treasurer is required to keep a book showing a list of members, deaths, collections, disbursements and other business transactions, which is open to the inspection of members. I. W. Gill is the only person to whom members can apply for burial service, or upon whom they can rely to furnish future burial benefits in consideration of prior assessments paid. When this suit was commenced the membership of this association was about 8000, and the management had been in all respects satisfactory.

The association was organized November 1, 1900. No such organization had existed in the state prior to 1899. The funds collected are used exclusively for the payment of burial expenses of deceased members, and surviving relatives are not benefited thereby in any other manner. The object of the association, as stated in its plan of organization, is "to provide a plan for the payment, by assessment, of the funeral expenses of each member."

We conclude from the foregoing facts that the business designed to be transacted under the plan of the Wichita Mutual Burial Association is plain, ordinary insurance. Membership in this association insures to each member above ten years of age that which is equivalent to one hundred dollars cash, payable at the death of such member to whomsoever would otherwise defray the burial expenses of such decedent.

If the certificate of membership issued by this burial association be designated a "policy," the assessment a

The State v. Burial Association.

"premium," and those who are relieved from paying the funeral expenses of the deceased member "beneficiaries," this association, both in general plan and phraseology, would be a substantial duplicate of the ordinary mutual-insurance company.

The fact that no beneficiary is specifically named deserves little consideration, since in reality one exists, and may be ascertained with as much certainty as if directly and specifically mentioned. Whoever would otherwise pay the burial expenses of the deceased member is, by being relieved of that burden, as directly benefited to the amount of such expenses as if the cash were paid immediately to such person. If the deceased member leave an estate, the whole thereof, undiminished by the burial expenses which would otherwise be paid therefrom, will be received by his heirs. If he leave no estate, then his immediate relatives and friends who would otherwise have to furnish the expenses of his burial will be benefited by being relieved of that burden.

This association does not belong in the category of benevolent and philanthropic societies which furnish relief to their unfortunate and distressed members out of funds contributed for that purpose. In such associations it is not contemplated that every member will be the recipient of the relief thus provided. Financial distress, sickness and misfortune visit many people, but they are usually of temporary duration, and, when relieved, the sufferer is in a condition to return in kind the generous assistance which has been extended to him. Societies of that kind are in a large measure benevolent and charitable. Contributing members anticipate the possibility of being at some time benefited from the fund contributed, but their anticipation is only a possibility, as comparatively few members receive relief therefrom.

The burial association, however, discloses no charitable or benevolent features. Membership in it does not involve fraternity, social intercourse, or even or-

Haines v. Goodlander.

dinary casual acquaintance. The contract with each member is based wholly upon business considerations. The assessments are paid for the purpose of securing thereby a burial worth one hundred dollars. The uncertainty as to when the funeral will take place gives each member good reason to suppose that it will probably be needed long before the assessments amount to the sum which it is expected to cost. We think this association is doing an insurance business, and should comply with the laws of the state.

The judgment is reversed, and the district court directed to grant a perpetual injunction, as prayed for in plaintiff's petition.

All the Justices concurring.

MRS. H. T. HAINES v. E. C. GOODLANDER,
as Executrix, etc.

No. 14,312. (84 Pac. 986.)

SYLLABUS BY THE COURT.

1. EVIDENCE—*Action on a Lost Note—Deceased Maker—Proof of Plaintiff's Financial Condition.* In an action upon a note for a large amount purporting to have been given by one since deceased, where the plaintiff claimed that the note was accidentally destroyed or lost but that it represented a *bona fide* loan of money by her to the deceased, and the claim for the defendant was that no note was in fact ever given and that the plaintiff's claim was fictitious and fraudulent, testimony that plaintiff was financially embarrassed about the time the note was claimed to have been given and was without the means to make the loan was properly received; and held, further, that the testimony was sufficient to uphold the verdict in favor of defendant.
2. ——— *Opinion Testimony—Basis of a Judicial Finding.* A witness who admits that he does not know the amount of certain checks should not be allowed to give his estimate, as a judicial finding cannot be based upon mere conjecture.
3. ——— *Complicated Accounts—Summary by a Competent*

Haines v. Goodlander.

Witness. Where book entries, vouchers or accounts are voluminous or complicated, the testimony of a competent witness who has made an examination and summary of them may ordinarily be received; but in the present case it does not appear that either the original or the summary offered was competent evidence.

4. ——— *Self-serving Declarations.* To meet the testimony that the plaintiff was not financially able to make the loan in question she offered to show that at one time she had proposed to pay a large indebtedness to one of her creditors, but that payment was declined. *Held*, that this was a self-serving declaration, and it was properly excluded.
5. INSTRUCTIONS—*Comment upon the Evidence.* While the trial court may not comment upon the weight of the evidence submitted to the jury, nor assume the existence or non-existence of controverted facts, it is not precluded from referring to parts or lines of evidence offered by the respective parties and making concrete applications of the law to them.
6. ——— *Formulating Instructions—Limitations of the Court.* The court should be careful not to mislead the jury by singling out and giving undue prominence to a particular fact in the case, nor by unduly emphasizing the contentions of either party, but it is often necessary and proper for the court to speak of important features in the evidence, and advise the jury as to the rules of law applicable to such facts.

Error from Bourbon district court; WALTER L. SIMONS, judge. Opinion filed March 10, 1906. Affirmed.

W. R. Biddle, and *A. M. Keene*, for plaintiff in error; *Keene & Gates*, and *Biddle & Lardner*, of counsel.

W. C. Perry, *J. I. Sheppard*, and *John H. Crain*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: Several months after the death of C. W. Goodlander, H. T. Haines and his wife presented a joint demand in the probate court against the Goodlander estate for \$28,368.90, founded upon a note said to have been executed by C. W. Goodlander on August 2, 1901, for \$26,000, payable to the order of Mrs. H. T. Haines, one year after date, with interest at eight per cent. per annum. Haines and his wife claimed that the

note had been accidentally destroyed and therefore a copy of it was not set forth. The execution of the note and the validity of the demand were contested by the executrix of the estate before a jury, who found against the claimants. An appeal was taken to the district court, where another trial was had with a jury, and again the verdict was against the claimants.

The first objection is that the verdict is not sustained by sufficient evidence. This point may be easily determined. There is testimony tending to discredit the claim that the note was ever executed by Goodlander. Aside from the great disproportion between the amount of the note and Mrs. Haines's financial resources, there is testimony to the effect that she was not only without means but was largely in debt when she began business in Fort Scott; that during the time she claims to have accumulated the money loaned her business was in fact unprofitable; and that a great deal of the time she was financially embarrassed, and from time to time borrowed money to meet her most pressing obligations. Mention might be made of testimony that she never deposited this great amount of money in a bank, but that it was kept in insecure places about her house, and carried with her when she traveled. She said the note was burned accidentally the day of Goodlander's burial, but she did not present her claim to the representative of the estate, nor mention the burning of the note to any one, not even her husband, for fifty days after the claimed destruction. There were other circumstances which may have led the jury to discredit the claim that a loan was made, or that a note existed; and, besides, quite a large number of her neighbors gave impeaching testimony against her. It is true that several witnesses were produced by her who said they had seen the note, or heard an acknowledgment of its existence, but the accuracy of their observation as well as the credibility of their testimony were questions for the jury. The verdict, which in

effect rejected the theory and testimony of the plaintiff, is not without substantial support.

Many objections were made to the rulings upon testimony, some of which are not sufficiently material to require attention.

Complaint is made of the exclusion of the testimony of a cashier of a railroad company as to the approximate amount of checks delivered by him to Mrs. Haines. The checks were in favor of her husband, who had been running a boarding-train for the railroad company, and who at first claimed to be a joint owner with Mrs. Haines of the note in suit. Later in the litigation, and before the final trial, Mr. Haines disclaimed any interest in the note, withdrew from the action, and was thereafter to be regarded as an outside party. Being no longer a party to the action, his transactions with others had no direct bearing upon the case. Again, the witness stated he did not know the amount of the checks, and a mere conjecture or surmise cannot be made the basis of a judicial finding. The court did allow the plaintiff to show that her husband's checks were delivered to her, and, if it had been claimed that the money loaned to Goodlander was derived by her from that source, it might have been shown by competent evidence. The fact that the checks may have come to or passed through her hands does not of itself prove that the money represented in them belonged to her. No testimony as to her own earnings or accumulations was excluded.

The testimony of the auditor of the railroad company as to payments made to Mr. Haines, as shown by the books, was inadmissible for the same reason that applied to the exclusion of the cashier's testimony. It is true, as plaintiff claims, that where book entries, vouchers or accounts are voluminous or complicated, the testimony of a competent witness who has made an examination and summary of them may be received, but the evidence of the auditor was excluded, not because it was not the best evidence, but because it was

not competent to show the pecuniary means of the plaintiff.

Objection is made because plaintiff was not permitted to testify whether she had any papers in her hands when she left the presence of Goodlander on February 2, 1900. As he had died, of course she could not testify to any transaction had personally with him. What she was carrying after her visit to Goodlander can hardly be regarded as a personal transaction with him, but it did not appear that the testimony invited was material or competent. The character of the papers which she had was not suggested, the time mentioned appears to have been long prior to the date of the note in question, and there was no offer to prove that the papers had any connection with the alleged loan.

There is no reason to complain of the testimony of Comingore, who professed to have seen the note in suit in Mrs. Haines's possession. Many questions were evidently rejected because they were suggestive and not in proper form. Answers were evidently excluded because not responsive or because they were conclusions or repetitions. In discriminating rulings the court undertook to confine the testimony within due bounds, and permitted the witness to state pertinent facts which he assumed to know as to the size and form of the paper on which words and figures were printed and written; that it was dated; that it had Mrs. Haines's name on it; that it was for a large sum of money—more than \$20,000; and that the name of C. W. Goodlander was at the bottom of it. Proper questions as to the contents of the paper were allowed, but of course the witness was not permitted to state the ultimate fact that what he saw was a note, nor to give other conclusions of fact.

The testimony of Copeland as to an admission by Goodlander that he had obtained a loan of \$25,000 was not competent. No identity was shown between that loan and the note in suit.

Haines v. Goodlander.

Complaint is made that part of an answer of the witness Reese was excluded. So much of it as alluded to a certain letter was properly rejected. The statement that "to the best of my recollection the name of C. W. Goodlander was at the bottom of the note" might have been admitted, but was probably excluded because of the uncertainty implied by the language of the witness. Later, however, the witness stated in no uncertain terms that the name of C. W. Goodlander was at the bottom of the note, and this testimony the court refused to strike out.

The witness Shaffer was asked to give her opinion as to whether the signature of C. W. Goodlander on a letter was in the same handwriting as his signature on the note. The offer was properly rejected because she was not shown to be a competent witness, and had admitted that she did not know Goodlander's handwriting.

In order to meet the testimony of her financial inability to make the loan, plaintiff offered to show that in July, 1901, she had proposed to pay to one of her creditors a debt of \$4000, but that the payment was not accepted. This was a self-serving declaration, and was rightly refused.

Complaint is made of testimony to the effect that plaintiff had stated at different times, and in various ways, that she was losing money in her business—was hard up and without means to meet accruing debts. Whether her claim, of which no written evidence was in existence, was a valid or a fraudulent one was a leading issue in the case. It was made prominent also by her counsel in his opening statement to the jury when he said that plaintiff would prove, not only that the claim was honest, but that she was financially able to make the loan from money earned and otherwise acquired. Under the circumstances a wide scope of inquiry was justified, and it does not appear to have been unduly extended by the trial court.

Other objections are made to the rulings on the ad-

Haines v. Goodlander.

mission of testimony, but they are not deemed to be material, and it is clear that they furnish no grounds for reversal.

It is contended that in submitting the case to the jury the court assumed the existence of facts which were in dispute, and gave undue prominence to some circumstances of the case. It is said that the court, in the fifth instruction, assumed that admissions had been made respecting losses sustained by the plaintiff in conducting a railroad eating-house, and also of the acceptance of money from the railroad company to make up such losses. It is not easy to say that there was a real dispute as to admissions of this character, but the court did not in fact assume that such admissions had been made. It charged the jury to consider "for what you may think it is worth the evidence as to admissions claimed by the defendant to have been made by the claimant, including the claims, if any," which were then enumerated. As will be observed, the court spoke of the claim of defendant as to certain admissions, and left the jury to decide if any admissions had been made.

Complaint is made of the sixth instruction given by the court, which is as follows:

"You are instructed that unless you believe from a preponderance of the evidence that 'Exhibit A,' introduced in evidence, is a portion of a letter written by C. W. Goodlander to Mrs. H. T. Haines, and that in said letter there was a statement concerning the alleged note, then you should wholly disregard said 'Exhibit A.' If you believe from a preponderance of the evidence that 'Exhibit A' is a portion of a letter written by C. W. Goodlander to Sam W. Webb, then you will disregard the testimony for the plaintiff as to the contents of what she claims to be the missing part of a letter written by C. W. Goodlander to her."

No error was committed in giving this instruction. On the one side it was said that the letter, only a fragment of which was preserved, contained an admission by Goodlander that he had given the note to Mrs.

Haines v. Goodlander.

Haines. On the other side it was claimed that it was a portion of a letter written by Goodlander to Webb, which in some way had fallen into the hands of Mrs. Haines. The portion of the letter preserved made no reference to the note in suit, but Mrs. Haines claimed that the missing part did refer to the note, and offered proof to that effect. If the letter was not written to Mrs. Haines, and made no reference to the note, it had no relevancy to the case, and it was the duty of the court to take from the consideration of the jury the contents of a letter which had no bearing upon the case.

In neither of the instructions criticized did the court invade the province of the jury, or violate the rules governing instructions. While the court may not comment upon the weight of the evidence, nor assume the existence or non-existence of controverted facts, it is not precluded from referring to the evidence in the case. It is not improper to assume the existence of conceded facts, nor to call the attention of the jury to alleged facts which are not in dispute; and, if a fact essential to a recovery is lacking, the court, on application, is required even to take the case from the jury. The court should present the theories of the respective parties, and in doing so may refer to the lines of evidence introduced by the parties and upon which each relies, carefully refraining from expressing an opinion as to what the facts do or do not prove and from giving any intimation from which the opinion of the court might be inferred. Instead of stating abstract principles of law, the court should aid the jury by making a concrete application of the law to the facts in issue which there is evidence to support. While the court should be careful not to mislead the jury by singling out and giving undue prominence to a particular fact in a case or unduly emphasizing the contentions of either party, yet there is no reason why the court should not in some cases refer to particular parts of the evidence and advise the jury as to the rules of law

applicable to such facts. Frequently the court can properly and effectually refer to the evidence to illustrate the statements of law given to guide the jury.

The reference in the sixth instruction to the letter did not offend by giving undue prominence to a particular fact. If the letter was written to Mrs. Haines its contents were pertinent and important, but if it was written to Webb, and did not mention the note in question, its contents had no bearing upon the case and could not be given any consideration. The contentions of the two parties with respect to the letter were fairly stated, and the instruction was appropriate. Neither the repeated references to the "alleged note" and "alleged claim" nor the repetitions of the phrase "preponderance of the evidence" are deemed to be prejudicial.

The instruction as to impeaching evidence was given for the benefit of the plaintiff, and is not erroneous.

It is argued that in charging the jury as to the implied consideration of written contracts the court left the construction of a statute to the jury. There was a quotation from the statute on the subject; but it would be difficult to make a clearer statement of the rule than is contained in the statute, and the adoption and use of the statutory phrase in the instruction is not open to criticism.

We think the theories of the contending parties were fairly and impartially presented to the jury, and that none of the objections to the instructions affords ground for reversal.

Not all of the points raised by plaintiff have been mentioned, and perhaps some of those mentioned did not require special comment, but all have been carefully examined, and we discover no grounds for setting aside the verdict of the jury, nor the judgment based upon it. The judgment is affirmed.

All the Justices concurring.

JOE A. GOODYEAR v. F. A. WILLIAMS *et ux.*

No. 14,335. (85 Pac. 300.)

SYLLABUS BY THE COURT.

1. AGENCY—*Payment to Alleged Agent—Proof of Authority.* In a foreclosure suit, under a plea of payment through an agent, where it appears that the note and coupons were payable at a certain bank, and that the defendant paid the same to a third person in no way connected with the bank and before the principal note became due, and that the alleged agent, at the times of payment, did not have possession of either the coupons or the note, it is error to admit as evidence of the controverted agency any of the following: (1) Statements of the alleged agent made at the time of the execution of the papers, without the knowledge of the mortgagee, that the interest coupons might be paid to him; (2) letters written by the plaintiff to the alleged agent which relate only to specific claims against other persons and of which the defendant had no knowledge at or before the time of the payment; (3) entries in a loan register, not a book of accounts, kept by the alleged agent, of which neither the plaintiff nor defendant had any knowledge at or prior to the time of payment.
2. ——— *Payment to a Third Party—Presumption as to Agency.* Where a debtor delivers money to a third person for the purpose of paying a promissory note which is not due, and such person does not have the note in his possession, the presumption is that the person receiving the money does so not as the agent of the creditor but as agent for the debtor. This presumption can only be overcome and the converse established by evidence to the contrary.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed March 10, 1906. Reversed.

STATEMENT.

THE plaintiff in error commenced this suit in the district court of Sedgwick county to recover upon a promissory note and coupons, and to foreclose a real-estate mortgage given to secure the same, the note having become due by reason of a default in the pay-

Goodyear v. Williams.

ment of an interest coupon. The defendants, Williams and wife, answered that there was a condition in the note and mortgage by the terms of which they were authorized, at their option, to pay off the same at any interest-paying period by giving thirty days' notice in writing; that in June, 1902, they paid the same to one H. F. Goode, the agent of the plaintiff, and that they paid interest on the principal sum up to the 1st day of August, 1902, which was the next interest-paying day. The principal note by its terms did not mature until the 1st day of February, 1903. The plaintiff, by verified reply, denied the agency of H. F. Goode to receive such payment, and alleged that plaintiff had no knowledge that Goode had ever pretended to collect the note until the filing of the answer in this suit, and that at the time of the alleged payment the note sued on was in the possession of the plaintiff at his home in Manchester, Mich.

The claim that the defendants paid the principal note and the coupon for interest thereon to August 1 to Goode is uncontroverted, and it is uncontroverted that the alleged agent, Goode, never paid the same over to the plaintiff. Goode died insolvent before the commencement of this suit, and either the plaintiff or defendants must lose the amount paid to him. From a judgment for the defendants the plaintiff prosecutes error.

Adams & Adams, for plaintiff in error.

Emera E. Wilson, and *Edward Dill*, for defendants in error.

The opinion of the court was delivered by

SMITH, J.: The sole issue in this case is whether Goode was the agent of the plaintiff to receive the alleged payment. It is not contended that Goode had the possession of the principal note or of the coupon claimed to have been paid at the time of the payment of the note. Goode could only become the agent of the

plaintiff by will of the plaintiff and the acceptance of such agency by Goode. The intent of the plaintiff to make Goode his agent might have been evidenced by written or oral instructions directing Goode to take charge of plaintiff's loans generally at Wichita and to collect the same at his discretion before or after maturity, or by such directions relating specifically to the loan of defendants; or such authority from the plaintiff to Goode might have been presumed by the defendants from transactions between the plaintiff and Goode which came to their knowledge before the payment. If the defendants had known of such transactions between the plaintiff and Goode prior to the payment as would justify them in believing that Goode had general authority over the loans of plaintiff in that locality, and had authority to receive payment of the same before due and without the possession of the notes and mortgages securing such loans, the plaintiff would be estopped from denying the authority of Goode to receive the payment.

We think, however, there is no evidence in this case of express authority to Goode as a general or special agent of the plaintiff. Nor is there evidence of such dealings between the plaintiff and Goode, the knowledge of which came to the defendants before the payment, as would justify them in presuming such agency or would estop the plaintiff from denying the same. Statements of the alleged agent made in the absence and without the knowledge of the plaintiff, at the time of the execution of the note and mortgage, that the interest coupons might be paid to him, are not competent evidence upon the issue in this case. Nor are letters written by the plaintiff to the alleged agent which relate only to specific claims against other persons, and of which the defendants had no knowledge at or before the time of payment, competent evidence. Nor are the entries in a loan register, not a book of accounts, kept by the alleged agent, of which neither the plaintiff nor the defendants are shown to have

had any knowledge prior to the alleged payment, competent evidence upon the issue in this case.

Where a debtor delivers money to a third person for the purpose of paying a note which is not due, and of which such person is not in the possession, the presumption is that the person receiving the money does so not as the agent of the creditor but as the agent of the debtor. This presumption can only be overcome and the converse established by evidence to the contrary. The presumption of agency from the possession of the note by the person claiming payment is ordinarily sufficient in itself to justify the debtor in making the payment, and the want of such possession is of itself sufficient to put the debtor upon inquiry as to the authority of the agent to receive payment. If this be so, it would seem that the circumstances must be strong, in the absence of direct authority from the creditor, that would justify a debtor in paying a note, especially one not due, to a pretended agent so as to bind the creditor thereby. Such circumstances, it would seem, must practically amount to an estoppel upon the creditor to deny the authority of the agent—an estoppel *in pais*.

If the dealings of the plaintiff with the defendants or with others, of which the defendants were cognizant, reasonably led the defendants to believe that Goode had full authority from the plaintiff to receive payment of the debt without having possession of the note, and if the defendants made the payment to Goode relying upon such conduct of the plaintiff, then it might be said that it would be a fraud for the plaintiff to deny Goode had such authority, and the plaintiff might be estopped by such conduct from denying it; but such is not the evidence in this case. The evidence of Williams as to what Goode said in regard to the payment of the interest coupons to him would only be competent after the agency of Goode was established, and is incompetent for the purpose of establishing such agency. It is not shown that Williams

relied on the transactions set forth in the letters, or in the entries in the loan register, as he is not shown to have had any knowledge of either at the time of the payment.

There are other trial objections, but they are really based upon the incompetency of the evidence referred to above and we do not consider it necessary to discuss them. The judgment of the district court is reversed, and a new trial granted.

All the Justices concurring.

THE NATIONAL SURETY COMPANY *et al.* v. THE KANSAS CITY HYDRAULIC PRESS BRICK COMPANY.

No. 14,347. (84 Pac. 1034.)

SYLLABUS BY THE COURT.

1. **CITIES—*Paving Contract Held Void—Restricting Competition.*** Where a city council enters into a contract for paving the streets of a city with vitrified brick, and the petition, ordinance and contract provide that brick of a particular brand, manufactured and sold by but one person or company, shall be used, and other kinds of vitrified brick equally good for the purpose are made and sold in the vicinity by other companies, the proceedings to pave and the contract are void under the provisions of section 747 of the General Statutes of 1901 requiring such contracts to be let to the lowest bidder, and contrary to public policy, in restricting and preventing free competition.
2. ——— ***Petition for Improvements—Description of Material to be Used.*** The provision of section 730 of the General Statutes of 1901 requiring that the petition for such improvements shall state a specific description of the material to be used is fully complied with, in cases where vitrified brick is to be used, by the use of the words "vitrified brick," followed by words describing the standard of quality desired.
3. ——— ***Contractor's Bond—Action against Surety for Material Furnished—Notice of Illegal Proceedings.*** When a contract entered into by a city for paving streets is void for the reason that no opportunity is given therein for free com-

73 196
73 768
73 769
74 797

73 196
76 916
76 918

Surety Co. v. Brick Co.

petition in the purchase of the materials used, all the proceedings are void, and persons who furnish labor or material with full knowledge of the facts which constitute the proceedings illegal are bound thereby and cannot maintain an action against the surety of the contractor who has furnished a bond under the provisions of section 5130 of the General Statutes of 1901.

4. ——— *Answer Not Demurrable.* In an action upon such a bond to recover for material furnished to a contractor and used in paving streets of a city, an answer which sets up the facts which render the contract between the city and the contractor illegal and void as against public policy, and states that any material furnished by plaintiff was with full knowledge of all such facts, states a good defense, and a demurrer thereto should be overruled.

Error from Wyandotte court of common pleas;
WILLIAM G. HOLT, judge. Opinion filed March 10,
1906. Reversed.

STATEMENT.

THIS action was begun to recover for brick furnished to W. W. Atkin, a contractor, who paved certain streets of Kansas City, Kan. The action was brought against W. W. Atkin, as principal, and the National Surety Company, as surety upon his statutory bond. On the conclusion of the evidence the court directed a verdict in favor of plaintiff and against Atkin and the surety company for \$6115.95, and the surety company prosecutes error.

The petition recites that in September, 1901, Atkin entered into a contract with the city for paving certain streets with brick, and, in accordance with the provisions of the statute, a bond was executed, with the surety company as surety, conditioned that the contractor should pay all indebtedness incurred for labor or material furnished in making such improvements; that plaintiff, under a contract with Atkin, furnished the brick sued for; that the same were used in making the improvements, and had not been paid for. There were three streets improved under separate contracts, and the material furnished for each was made the

Surety Co. v. Brick Co.

basis of a separate cause of action. The petition set out copies of the bonds, which are in conformity with the provisions of section 5130 of the General Statutes of 1901.

The National Surety Company filed an answer which set up a general denial, and in addition two further defenses, to which the court sustained separate demurrers. The sole question to be decided is whether these demurrers were rightfully sustained. The second and third counts of the answer are as follow:

"(2) For another and further answer and defense, this defendant says that at the time of the execution of the contract between W. W. Atkin and the city of Kansas City, Kan., described in plaintiff's petition, it was provided by section 747 of the General Statutes of Kansas, 1901, that before any work of the character provided for in said contract should be commenced sealed proposals therefor should be invited by the city of Kansas City, and said work should be done by contract let to the lowest and best bidder. The purpose of said provisions of the statute was to require competition in all such work.

"The Diamond Brick and Tile Company at all the times mentioned in plaintiff's petition, and for a long time prior thereto, was, and now is, engaged largely in the business of manufacturing and selling vitrified paving brick for use in paving streets of cities and towns. It had the exclusive sale of all said brick manufactured by it, and it alone had the right to, and did, sell said brick to parties engaged in the business of paving with them streets in cities and towns. Said brick had become known as, and were generally called in the city of Kansas City and vicinity, 'vitrified paving brick, Diamond brand.' At all said times mentioned, other kinds and makes of vitrified paving brick were manufactured and sold in the city of Kansas City and vicinity, and were used in paving streets of cities or towns, equal in all respects to the brick manufactured and sold by said Diamond Brick and Tile Company. Said other kinds and makes of brick were fully up to all the tests and standards established by the authorities of the city of Kansas City for paving brick, and were as easily obtainable in the markets of said city as said brick made by said Diamond Brick and Tile Company.

"Some time prior to the execution of the contract described in plaintiff's petition, and prior to the passage of the ordinance authorizing the doing of the work out of which this controversy has arisen, the Diamond Brick and Tile Company circulated and caused to be circulated among the resident owners of the lots and lands fronting upon Fifth street, a street in said city of Kansas City, between Central avenue and Euclid avenue, a petition asking that the proper authorities of the said city cause said street to be paved with vitrified paving brick, Diamond brand, the manufacture of said Diamond Brick and Tile Company, and procured a majority of said resident landowners to sign said petition. Its purpose in circulating and causing said petition to be circulated and signed as aforesaid was to procure the paving of said street with its brick, of which it had the exclusive manufacture and sale, to furnish such brick for such purpose and to prevent competition as to the brick to be used in paving said street as required and provided by the statutes of the state of Kansas, as aforesaid. Thereafter said Diamond Brick and Tile Company, in furtherance of said purpose, requested and procured the authorities of the said city to have enacted ordinance No. 4680 of said city, which provided that said street should be paved with 'No. 1 vitrified paving brick, Diamond brand,' which was duly enacted. Said ordinance No. 4680 was approved on September 11, 1901, and was entitled 'An ordinance providing for the paving of Fifth street from Central avenue to Euclid avenue.' The work or improvement directed by said ordinance was of the character described in the provisions of said statute of the state of Kansas as hereinbefore referred to, and under the said provisions it was the duty of the authorities of said city to have so acted as to have had competition in making said improvement in all respects and every single detail thereof, including the materials out of which said improvement was to be constructed. Said ordinance violated said provisions of said statute by absolutely preventing all and any competition as to the brick out of which said improvement should be constructed, in that it required absolutely that it should be of the manufacture of the Diamond Brick and Tile Company, sold exclusively by it.

"After the enactment of the said ordinance said city entered into a contract with the defendant W. W. At-

kin, who was solicited by said Diamond Brick and Tile Company to bid thereon for making said improvement in pursuance of said illegal ordinance, and in compliance therewith said contract also provided that said pavement should be made of the vitrified paving brick exclusively manufactured and sold by the Diamond Brick and Tile Company. The Diamond Brick and Tile Company circulated said petition and obtained the signatures of property-owners thereto, requested and procured the council to enact said ordinance, and found and induced the contractor to bid on said work and obtain said contract, for the purpose of selling its brick for such work, in such manner that it would be impossible for any other kind of brick to be used, and, without its active efforts to that end, said work would not have been done or said contract made. By reason of the premises said ordinance and said contract are absolutely void in whole and in part, and the bond sued on herein, being founded on said contract, is also absolutely void in whole and in part.

"If the plaintiff sold any of the material described in its petition to the defendant W. W. Atkin, and delivered the same for the work described in the contract mentioned in plaintiff's petition, such sale and delivery were made with full knowledge of the facts hereinbefore set forth.

"Wherefore, having fully answered, defendant prays to be discharged, with its costs.

"(3) For another and further answer and defense herein, this defendant says that said contract described in plaintiff's petition, between W. W. Atkin and the city of Kansas City, provided that the work described therein should be begun within ten days after written notice so to do should have been given to said W. W. Atkin by the city engineer of the said city of Kansas City, and that said work should be completed within sixty days thereafter. Such notice was given by said city engineer to the said W. W. Atkin on September 15, 1902. But this defendant says that if any of the material described in plaintiff's petition was furnished to the defendant W. W. Atkin for said work, said material, and each and every part thereof, was, without this defendant's knowledge or consent, furnished more than sixty days after said notice was given by said city engineer to said W. W. Atkin, and more than seventy days after said notice had been given, and long after said contract had expired, and that therefore

there is no liability on the part of this defendant on said bond.

"Wherefore, defendant, having fully answered, prays to be discharged, with its costs."

The answer to the three causes of action was the same, and separate demurrers were sustained to the second and third defenses above set forth.

Frank Hagerman, and A. L. Berger, for plaintiffs in error.

McFadden & Morris, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: The conclusions we have reached in this case render it necessary to consider only the question whether the demurrers to the second and third counts of the answer should have been sustained. It is proper to say here that there is a substantial conflict in the averments of the answer and the claims advanced by counsel for plaintiffs in error in their briefs, which makes it somewhat difficult to understand what their position is. It is asserted in the briefs that "the answer pleaded that the plaintiff actively promoted the work, and by its manipulation had the city order and advertise that the work should be done with a certain kind of brick only furnished by the plaintiff." Again they say:

"The allegations contained in the answer of the National Surety Company charge that the improvements were promoted by the plaintiff below, for the purpose of having the city, in ordering it to be done, expressly to direct in the ordinance and the contract thereunder that the improvements should be constructed out of the brick exclusively manufactured and sold by it; that both said ordinances and contracts did so provide; that plaintiff did sell all the brick that were used in the construction of the improvements."

In the reply brief particular attention is again called to the answer, and it is persistently urged that it contains these averments. A careful reading of the answer will disclose, we think, that this claim is incor-

Surety Co. v. Brick Co.

rect. No such statements are found there, in substance or in form. The answer alleges that all the illegal acts complained of were procured to be done by the Diamond Brick and Tile Company, but nothing connecting that company with plaintiff is alleged, save and except the following: "If plaintiff sold any of the material described in its petition to the defendant W. W. Atkin, and delivered the same for the work described in the contract mentioned in plaintiff's petition, such sale and delivery were made with full knowledge of the facts hereinbefore set forth." If the plaintiff had been the Diamond Brick and Tile Company, or if the answer had alleged what the briefs say it did, it is apparent that a different question would be presented.

If it be conceded that the facts set forth in the answer established the illegality of the contract entered into by Atkin for the paving of these streets, then the further question arises, Is plaintiff, who is not alleged to have participated in the fraud or illegality, prevented from recovering for material furnished under a separate contract with Atkin, for the reason that the sale of the material was made "with full knowledge of the facts" which made it illegal? It will require no extended argument, we think, to demonstrate that the facts set forth in the second count of the answer, which are admitted by the demurrer, render the contract entered into for paving these streets illegal and void. Section 747 of the General Statutes of 1901 provides:

"Before the building of any bridge or sidewalk, or any work on any street, or any other kind of work or improvement, shall be commenced by the city council, or under their authority, a detailed estimate of the cost thereof shall be made under oath by the city engineer and submitted to the council; and in all cases where the estimated cost of the contemplated work or improvement amounts to one hundred dollars, sealed proposals for the doing or making thereof shall be invited by advertisement, published by the city clerk in the official newspaper of the city for at least three consecutive days, and the mayor and council shall let the work by con-

Surety Co. v. Brick Co.

tract to the lowest responsible bidder, if there be any such whose bid does not exceed the estimate."

The object and purpose of this provision of the statute is to insure competition in the letting of contracts for public improvements. This is the uniform ruling of courts in reference to similar statutory and charter provisions governing cities. (*Schoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945; *Smith v. Syracuse Improvement Company*, 161 N. Y. 484, 55 N. E. 1077; *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172; *Larned v. City of Syracuse*, 17 N. Y. Supr. Ct., App. Div., 19, 44 N. Y. Supp. 857; *Galbreath v. Newton*, 30 Mo. App. 380; *McQuiddy v. Brannock*, 70 Mo. App. 535.)

The answer alleges that several other kinds of vitrified brick were made and sold in Kansas City, equal in all respects to the particular brand named in the contract. The principal item of cost in the material used for this paving was the brick. If but one particular brand or make of brick was to be used, in the very nature of things all opportunity for competition was eliminated, and favoritism, fraud and corruption were made possible, and extremely probable. Indeed, fraud and favoritism were so apparently the purpose of this provision of the contract and ordinance that the court should not hesitate to condemn as illegal and void all the proceedings. It is urged, on the other hand, that section 730 of the General Statutes of 1901 provides that "in case of paving, such petition shall state the width of the paving, and a specific description of the material to be used." This provision must be construed with the other provision, which was obviously intended to insure competition. To give to section 730 the construction urged would defeat the purpose of the other section. We give effect to both by holding that section 730 is complied with by describing in the petition the material used without designating a kind manufactured or furnished by but one person or company. In a petition for paving the use of the words

Surety Co. v. Brick Co.

“vitrified brick” of standard or some designated quality, without the mention of any particular make or brand, would certainly answer all the requirements of this section and still leave opportunity for competition. The tendency of the courts has been to hold all the proceedings void where opportunity for open competition is denied. In the case of *Smith v. Syracuse Improvement Company*, 161 N. Y. 484, 55 N. E. 1077, it was said:

“A petition for the pavement of a street in the city of Syracuse ‘with vitrified paving brick, manufactured by the New York Brick and Paving Company, of Syracuse, N. Y.,’ and all the proceedings had thereon by the common council, are in violation of the provisions of the city charter requiring the work to be let to the lowest bidder, and are void, when it appears that the company referred to has a complete monopoly upon the disposal of such brick, and that there are other persons or corporations who manufacture and sell vitrified brick for paving purposes, equal in quality to the particular kind specified.” (Syllabus.)

The court held that the petition was void because “through it the petitioners prayed the common council to take such action as was condemned by statute, and, therefore, the petition was void *ab initio*.” (Page 491.) In the case of *Schoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945, which is directly in point, the court said:

“The question thus presented is this: Had the board of public works the power under the charter to arbitrarily select a paving material that was manufactured by one company to the exclusion of the same material manufactured by other companies? The case shows that vitrified brick, as manufactured by the Diamond Brick and Tile Company, was not a patented article and was not thus a monopoly by reason of being patented. On the contrary, several other companies, in and near Kansas City, manufactured such brick for paving which had passed the standard tests for street paving. The general policy in Kansas City is that in letting public work opportunity must be given for competition. The very fact that the work is let on public

Surety Co. v. Brick Co.

notice at public bidding discloses this. . . . What possible opportunity can there be for competition when there can be but one bidder? What possible benefit can result to the property-holder for a public letting of the contract when the contractor has already been selected? The board of public works had the right to designate and select vitrified brick as the paving material, but it had no right to stifle competition and thereby violate the provisions of the city charter by cutting out, in advance, all competitors." (Pages 247, 248.)

We quote also from the opinion of the court in *Larned v. City of Syracuse*, 17 N. Y. Supr. Ct., App. Div., 19, 44 N. Y. Supp. 857, a case exactly in point:

"If all men were honest there would be need of few laws, but the experience of all cities shows that fraud sometimes enters into municipal contracts, and the object of the statute under consideration is to prevent favoritism, which is one of the most insidious and dangerous kinds of fraud. . . . If competition in brick can be thus restricted, the same rule can be applied to lime, labor and whatever enters into the cost of constructing a pavement. Bids might call for brick manufactured by A., lime made by B., broken stone furnished by C., and labor performed by D., all, however, at prices named, and thus favoritism be allowed to permeate the entire contract. Argument is hardly needed to show that this is not competition or a letting to the lowest bidder in the sense meant by the statute. The object of the statute is to keep prices down to reasonable rates, and when this is taken into account it is clear that it was the intention of the legislature that bidders should be unhampered by any restriction whatever, except the specifications regulating the amount and quality of the labor and materials; that bidders should be allowed to buy where they can buy cheapest, so that they can bid lower than if compelled to buy of one company, and that competition should extend to one part of the contract as much as another." (Pages 26, 27.)

In the case at bar the answer set up facts with reference to the contract which, if true, rendered it absolutely void because it was against the provisions of

the statute, and in contravention of sound public policy.

Conceding the illegality of the contract between Atkin and the city, there remains the question whether the answer contains averments which sufficiently connect plaintiff with the illegality to prevent it from recovering for the material furnished. Some contracts are so inherently vicious and immoral that no action can be maintained to enforce them; and courts will not permit a recovery upon a collateral contract which is so connected with the former that the illegal or immoral purpose is kept in view. Where goods are sold or premises leased for the express purpose of being used for an immoral and unlawful purpose the agreement is void, and there can be no recovery of the price. (9 Cyc. 573.) A case in point is *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960, where a vendor sold goods with the knowledge that they were to be used in a house of ill fame, reserving title with the right to take possession, and was denied the right to recover.

The contract to pave in this case was not illegal or immoral upon its face, but the answer pleaded facts which, if true, rendered it contrary to public policy and void. In the case of *De Wit v. Lander*, 72 Wis. 120, 39 N. W. 349, plaintiff sued upon a contract which it appears from the evidence involved a partnership with another to engage in the business of a night scavenger, which the ordinances of the city prohibited a person from exercising without a license. It was held he could not recover.

"It is a general rule that contracts are void which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute (even where such statute does not expressly declare them void); and that a party who is obliged to trace through such a contract his right to a debt alleged to be due him cannot recover." (*Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.)

Surety Co. v. Brick Co.

The rule is stated by Kent as follows: "If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it. But if it be unconnected with the illegal act, and founded on a new consideration, it may be enforced." (2 Kent's Com., 14th ed., *466.) And in the case of *Buck v. Albee*, 26 Vt. 184, 190, 62 Am. Dec. 564, it was said:

"In the application of this rule it may be observed that in all cases where it is necessary to prove the illegal contract and sale to enable the plaintiff to recover, then the contract is so connected with the illegal act that a recovery cannot be had. But if the right can be established without such proof, the plaintiff may recover; for the claim is unconnected with the sale, and rests on a new consideration."

When the party complaining can establish his claim without relying upon the illegal transaction, it is the general holding of the courts that he can recover; but, if it requires the aid of the illegal contract or transaction, he cannot. The cases are collated in volume 9 of the *Cyclopedia of Law and Procedure*, pages 546 and 556.

The petition of plaintiff in this case is based upon the surety bond. The statute requiring the giving of the bond sued on reads as follows:

"That whenever any public officer shall under the laws of the state enter into contract in any sum exceeding one hundred dollars, with any person or persons, for purpose of making any public improvements, or constructing any public building, or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements." (Gen. Stat. 1901, § 5130.)

Plaintiff's petition recites, first, the making of the contract, and refers to the same, with the plans and

specifications on file in the office of the city clerk; next, the execution of the surety bond, the furnishing and use of the material, and non-payment by Atkin. In the opening statement of plaintiff's counsel the contract for paving is referred to as the first step in the proof, and the contract itself, with the plans and specifications, was introduced in evidence as a basis for the execution of the bond sued on. Thus it is apparent that in order to maintain the action plaintiff found it necessary to allege and prove the contract, which from the facts set forth in the answer was illegal and void. As was said in *Thomson v. Thomson*, 7 Ves. Jr. 470, 473, "here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it." (See, also, *Gunter v. Leckey*, 30 Ala. 591.)

It is urged that the statute requiring the giving of a bond was enacted for the express protection of laborers and material-men; and that, therefore, plaintiff is within its protection, and, not being a party to the illegal contract entered into by Atkin and the city, the facts set forth in the answer constitute no defense. It is a well-recognized rule that where the statute, the violation of which makes the contract illegal, is enacted for the protection of one of the parties to the transaction, he can recover notwithstanding he must prove the illegal contract. Thus, where statutes against usury make the contract illegal, the party injured may maintain an action to recover the excess, for the reason that the statute was designed to protect the needy borrower, and to deny him the right of action would defeat the purpose of the law. The penalty is imposed upon but one of the parties, and the law does not consider them *in pari delicto*. (9 Cyc. 553.) The statute requiring competition in the letting of contracts for public improvements is what renders the contract here illegal; and the intention was to protect the taxpayer and the public—not material-men and laborers. The exception noted to the

Surety Co. v. Brick Co.

general rule does not reach so far as counsel contend, nor does it afford protection to plaintiff.

The statute upon which plaintiff relies and which authorizes the execution of the bond contemplates that, first, a valid contract shall be made—a contract let by competitive bids; competition is a condition precedent to the letting of a valid and binding contract. With full knowledge of the facts plaintiff cannot maintain an action upon the bond, because in order to do so it is necessary to prove the contract for the improvement; and when it appears by the facts averred in the answer that the contract was illegal and void, and that plaintiff had full knowledge of those facts, its contract is likewise shown to be tainted, and falls with the other. In *Woolfolk v. Duncan*, 80 Mo. App. 421, 427, it was said:

“It is well settled that no action will lie upon any contract based upon any unlawful consideration, or which is repugnant to law or sound policy or good morals—*ex turpi contractu actio non oritur*. And it is equally well settled that if a contract grows immediately out of or is connected with an illegal or immoral act a court of justice will not enforce it. And if the contract in fact be only connected with the illegal or immoral transaction and growing out of it, though it be in fact a new contract, it is equally tainted. . . . There is no distinction between a contract that is immoral in nature and tendency and therefore void as against public policy and one that is illegal and prohibited by law.” (See, also, *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 608; *Kansas City v. O'Connor et al.*, 82 Mo. App. 655; *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.)

Sound policy, we think, requires us to hold that a contract of the character of the one in question, which is void for the reason that it opens the door to fraud and favoritism and to the defrauding of taxpayers and the public, shall not be used as the basis of recovery in an action by a party who acquired his rights with full knowledge of the facts which rendered the contract and the proceedings void. The facts averred

Railway Co. v. Pratt.

in the second count of the answer therefore constituted a defense to the action, and the demurrer should have been overruled.

The third count of the answer states no defense, and the demurrer was rightfully sustained. (*Risse v. Planing-mill Co.*, 55 Kan. 518, 40 Pac. 904.)

We find nothing substantial in the other errors assigned, but the case is reversed and remanded, with instructions to overrule the demurrer to the second count of the answer.

All the Justices concurring.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
v. C. H. PRATT.

No. 14,349. (85 Pac. 141.)

SYLLABUS BY THE COURT.

DAMAGES—Breach of Warranty—Grantor Estopped from Pleading the Statute of Limitations. In an action for damages for the breach of a covenant of warranty in a conveyance of real estate it appeared that at the time of the delivery of the deed and the payment of the consideration by the grantee a third person was in actual possession of the real estate, claiming to hold under a title paramount to that of the grantor in such deed. Such occupancy and claim were well known to the parties to the conveyance, and they knew that the occupant intended to hold possession until ousted by judicial process. Litigation was then pending and suits were contemplated by the grantor which would finally determine the ownership of such real estate. In the litigation which ensued the occupant was successful in the lower courts, but the grantor carried the cause to the supreme and federal courts. The grantee, concluding that the grantor would eventually lose, insisted upon repayment of his money. The grantor, however, by assurance that his title would ultimately be established, and, if not, that the money would be refunded, requested and induced the grantee to wait until the end of the litigation, which he did, relying upon the representations of the grantor. The matter was not ended until long after the

Railway Co. v. Pratt.

time provided by the statute of limitations within which an action upon the covenant of warranty might have been brought had expired. Soon after the final determination of the litigation, which was adverse to the grantor, the grantee brought an action upon the covenant of warranty in the conveyance. The grantor pleaded the statute of limitations. *Held*, that the grantor is estopped from maintaining such defense.

Error from Allen district court; OSCAR FOUST, judge. Opinion filed March 10, 1906. Affirmed.

John Madden, and *W. W. Brown*, for plaintiff in error.

Cates & Cates, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: The only question involved in this case is the statute of limitations as applied to a covenant of warranty in a conveyance of real estate. The facts briefly stated are these:

In 1889 the plaintiff in error conveyed the land in controversy to the defendant in error by an ordinary deed of general warranty, in consideration of \$954.20 cash paid at that date. At the time of such conveyance the grantor held a patent to the land from the United States. The land was occupied by one N. L. Ard, who claimed it as a settler under the homestead and preemption laws of the United States. He settled thereon in 1866, long before the plaintiff in error received its patent thereto. On July 26, 1866, the United States, by an act of congress, granted the alternate sections of a ten-mile strip of land to the plaintiff in error, then known as the Union Pacific Railway Company, Southern Branch, upon conditions named in the grant. To indemnify the company from loss on account of lands to which homestead and preemption rights might attach before these conditions were complied with, the act provided that the company might select in lieu thereof an equal amount of land from

lands adjacent to the ten-mile strip belonging to the United States. There was a large number of settlers upon these lands claiming under the homestead and preemption laws, and a sharp controversy arose between them and the railroad company as to their respective rights thereto.

The land in controversy in this action was outside the ten-mile strip. On November 3, 1873, the company selected it as an indemnity for lands lost as before stated. The controversy between the settlers and the company involved many homes and large and valuable tracts of land. It aroused great excitement, and many lawsuits were commenced relating thereto, both in the federal and local courts. The claims of the respective parties were subjects of public discussion, and were matters of general notoriety and common knowledge. This controversy continued without interruption from the date the land was selected by the company to December 19, 1900, a period of sixteen years prior to the execution of the conveyance to the defendant in error. To settle this dispute Pratt, the defendant in error, brought an action of ejectment against Ard in 1889 to recover a part of this land. The case was carried to the supreme court of the United States, where it was decided in favor of Ard on March 4, 1895. (*Ard v. Brandon*, 156 U. S. 537.) In 1894 the defendant in error commenced an action of ejectment against Ard to recover another part of the land involved in this action. This case was taken to the supreme court of this state, and decided against Pratt on June 8, 1901. (*Pratt v. Ard*, 63 Kan. 182, 65 Pac. 255.) On December 19, 1900, in a case brought by the United States in the circuit court for Kansas against all parties interested in the ten-mile strip and indemnity lands, the patent to the plaintiff in error for the lands involved in this action and the conveyance to the defendant in error thereof were canceled, and soon afterward the land was patented to Ard. The defendant in error was never in possession of this land, and never re-

Railway Co. v. Pratt.

ceived any profits therefrom because of the adverse possession of Ard. During the progress of the litigation, and after the conveyance to the defendant in error, considerable correspondence occurred between the attorneys for the company, who were fully authorized to bind the company thereby, and Pratt and his attorneys, among which were the following letters from T. N. Sedgwick, general attorney for plaintiff in error :

“PARSONS, KAN., November 18, 1895.

“I have your favor of the 16th, stating that the case of yourself against Ard for possession of the east half of the southeast quarter of 2-26-20 was decided against you by the court and in favor of Ard, and I note what you say about not taking the case further unless the company requires it.

“You will readily understand that you are hardly in a position to compel the company to assume all responsibility in this case at this late day. This suit has been pending since January 5, 1895, the date of the filing of your petition, and yet no notice whatever was given the company of the pendency thereof until the last ten days, and then we were right in the midst of a half a dozen courts, where we had more business than we could attend to. Of course, if you had given us notice earlier we could have assumed the responsibility which you now ask us to assume, but it was utterly impossible for me to be present at the trial of this case. I can only say we desire the case carried clear through all the courts.

“From your statement of the case to me Mr. Ard has not a ghost of a show, in my opinion. I have great confidence in the ability and integrity of Mr. Cates and Mr. Foust, and have no doubt they made the best case possible for you to make.

“I hope you have taken time to take the case to the supreme court, and as soon as I can get time I will investigate the matter, and if you do not desire to carry the matter further I will do it myself in your name.

“You spoke of the other cases. Of course, I know nothing of the other cases that you have lost, except the other piece of land owned by Mr. Ard. If you have any claim against the company which you have not presented, and which you desire to make, you will

Railway Co. v. Pratt.

have to make it and present it in due form, so that it can be properly investigated.

"Please write me how much time you have to make a case for the supreme court in the case of yourself against Ard, and whether or not you have the record in shape and tried it with a view of going to the supreme court. Of course, we do not give up on single trial."

"PARSONS, KAN., February 18, 1898.

"I have before me your favor of the 12th instant, and also yours of January 30, regarding the case of yourself against N. L. Ard, which you designate as the statute-of-limitations case.

"This case was taken to the court of appeals at Fort Scott, the record being filed there October 28, 1896, as shown by the clerk's letter to me. A waiver of summons was filed in the case on November 10, 1896. Its number on the clerk's docket is 422.

"With reference to your claim for refund of money, I can tell you nothing more than what I have already told you. At Mr. Rouse's request, I sent him a statement of such lands as I supposed we would eventually be called upon to refund the purchase-money, and yours was included in the list. Since that time patents have been issued to some of the land, and certain decisions have been rendered which looks as though our title to all this land would be good. I apprehend our company is waiting to see what the decision of the circuit court will be with reference to these lands. If your title is made good, there is nothing then due you from the company; if, on the other hand, your title is not made good, we certainly will have to refund you the money, I suppose. But you ought to wait patiently, as the others are doing, until this litigation is determined. I know how you feel about it, and you do not owe me any apology for anything you have said."

"PARSONS, KAN., March 28, 1900.

"I have before me your favor of the 27th, and I note you say that you sent me a copy of a letter from the commissioner to the register of the Topeka land-office sent you by Mr. Pratt, and asking me to return the same. Beg to advise that the papers you sent were sent to our attorneys, Britton & Gray, and were returned to you with the answer of Britton & Gray on March 3. I at the same time enclosed you a copy of the

protest which the railway company filed in the local land-office. You will find these papers all together.

"With reference to the appeal from the local land-office: It does not seem to me that it is necessary to take any notice whatever of the decision of the local land-office. The patent for the land has already been issued, and the local office, and in fact the entire land department, is already without jurisdiction, and cannot obtain jurisdiction of this land until the court, by some proceeding instituted for that purpose, sets aside the present patent. If I obtain judgment against Ard in the case of U. S. v. M. K. & T., I will have him ejected from the land. On the other hand, the only way that Ard can obtain a title to the land is by going into court and instituting a proceeding to set aside the present patent, and if he is successful then he can make his proof before the local land-office. But nothing that is done in the local land-office or by the land department would have any effect whatever upon the present litigation regarding the title to this land. Therefore I see no occasion for worry, trouble or expense over what may be taking place in the local land-office."

"PARSONS, KAN., April 7, 1900.

"I have before me your favor of the 6th instant, regarding the contest case pending in the local land-office between Ard on one side and yourself and the company on the other. I have advised that we pay no attention whatever to this case, because the supreme court of the United States has decided that when a patent has once issued to a piece of land the land department of the United States has lost jurisdiction, and cannot again entertain an application to enter the land, and any patent subsequently issued is absolutely void. Judge Stillwell has so held in a case in Woodson county.

"The land department seems to be misled entirely by the decision of the case of yourself against Ard, wherein the supreme court held that Ard should have been permitted to enter the land, but in that decision the court did not set aside the patent, and no application to enter the same could be entertained until it is set aside."

"PARSONS, KAN., June 28, 1901.

"I have before me your favor of the 27th instant asking what the company proposes to do with reference to the piece of land in section 2 involved in the late case of Pratt against Ard, wherein the court decided that

Railway Co. v. Pratt.

the statute of limitations had run in favor of Ard, and also the other piece in section 2, wherein Judge Hook set the patent to the railway company aside and adjudged the land to belong to Ard under the homestead claim thereto.

"Beg to advise that neither of these cases are yet finally determined. Whenever they are, then we will determine what course we will pursue with reference to your claim for a refund of the money. In the meantime you might send me a statement of the amount you claim should be refunded to you, so that I may look it over and consider the matter."

This action was commenced some time in 1902, or we so infer, as the amended petition was filed January 21, 1903. The amended petition refers to the deed as a whole, but the particular covenant sued on reads:

"And the said Missouri, Kansas & Texas Railway Company hereby covenants with the said party of the second part, his heirs and assigns, that it will, and its successors shall, warrant and defend the same to the said party of the second part, his heirs and assigns, against the lawful claims of all persons."

All informality in the pleadings is waived by stipulation. The action was tried in the district court of Allen county, and on January 8, 1904, the defendant in error recovered judgment for \$1760.36. The plaintiff in error brings the case here, complaining that the trial court erred in not deciding that the plaintiff's cause of action was barred by the statute of limitations, and also because the court gave judgment for attorneys' fees and taxes. The plaintiff pleads waiver and estoppel as to the statute of limitations.

It is conceded that no cause of action arises upon a covenant of warranty until after eviction, either actual or constructive. It is here claimed that the actual possession of Ard at the date of the conveyance to Pratt, under a claim of right which was subsequently decided to be the better and paramount title, constituted a constructive eviction, and a cause of action arose at once which would become barred in five years in this case, or on June 6, 1894. It is

Railway Co. v. Pratt.

sought to bring this case within the rule stated by Mr. Justice Allen in the case of *Clafin v. Case*, 53 Kan. 562, 36 Pac. 1063, which reads:

"The weight of authority seems to be to the effect that, where the land conveyed is actually occupied by another, under an adverse and better title, the covenant is broken without any other act by either party, and an action may be at once maintained upon it." (Page 562.)

In a certain sense this case probably falls within the above rule, but under the facts here shown we do not think the plaintiff in error ought to be permitted to make this defense. To do so is an act in bad faith, and operates as a fraud upon the defendant in error. When the conveyance was made and the company received the money of Pratt it was known by both parties that the land was occupied by Ard, who would maintain possession until ousted by judicial process. It was thoroughly understood that whether Pratt would receive anything by his deed or not could only be known at the end of litigation then contemplated or already in progress. The conveyance to him was evidently made with the intention on the part of both parties to wait and abide the judicial determination of title to the land. It would be trifling with the rights of these parties to assume that they contemplated an immediate repayment of the money paid by Pratt or that an action for its recovery could or would be commenced at once. The relation of the parties to the land remained unchanged after the delivery of the deed and the payment of the consideration money by Pratt until the decision of the United States circuit court, on December 19, 1900. Up to that time Pratt waited patiently, at the request of the plaintiff in error, while it was testing its title to the land in long and repeated lawsuits. He was assured from time to time that his title would be ultimately sustained, that Ard did not have "a ghost of a show," and was requested to "wait patiently, as the others are doing, until this litigation is determined."

Railway Co. v. Pratt.

The plaintiff in error assumed control of the case commenced by Pratt, and carried it to the highest court, apparently confident of success. Pratt was at times urgent and insistent, but was pacified by the assurance that "our company is waiting to see what the decision of the circuit court will be with reference to these lands; if we win, we owe you nothing; if not, you will get your money." It is not suggested that Pratt failed in any respect to do his full duty in the premises. He carried out the original understanding and subsequent requests by waiting for the company to establish its title to the land. In this there was no cessation of effort. The company was diligent and persistent. The facts that it was originally understood by each of the parties that the whole matter as to the conveyance and Pratt's ultimate right to the land should be held in abeyance until the end of the litigation concerning the same, and that Pratt was induced to wait longer than he otherwise would have done by the urgent requests of the plaintiff in error, are as unmistakably established as they would be if fully and formally reduced to writing. After Pratt has so waited, and the company after full opportunity to test its claim has failed, it would be unconscionable for it to assert the very delay which it requested for the purpose of avoiding payment to Pratt of the money paid by him, for which he has received nothing. The ordinary rules of justice and fair dealing rebel at the suggestion. The facts furnish abundant reason for the application of the rule of estoppel to such conduct. We think this is a case where this rule should be applied.

Cases may be found which are apparently opposed to this view; in fact, considerable conflict exists among the decisions concerning the general subject of changing the statute of limitations by agreement, waiver, or estoppel. Much of this confusion arises from the difference in statutes, and in the application thereof to particular cases. Very few of the cases, when closely examined, will be found to differ materi-

Railway Co. v. Pratt.

ally in principle from the view we have here taken; it would be useless, therefore, to attempt a review of them. In the case of *Mo. Pac. R'y Co. v. Com. Co.*, 71 Mo. App. 299, there were unsettled accounts between the parties, and negotiations for adjustment were pending a long time. After failure to settle, action was brought on one of them, in which the statute of limitation was pleaded. The court said, as to this plea:

"If there was any understanding between plaintiff and defendant, or assurance given by the plaintiff to defendant that the latter would accept the former's account in payment or discharge of that of the latter, when their mutual accounts should thereafter be settled, and that the former, relying upon such understanding or assurance, did not bring an action on its account within the statutory period, and but for that it otherwise would have done so, the latter should not be allowed to invoke the statute of limitations in bar of former's account." (Page 304.)

In the case of *Haymore v. Commissioners*, 85 N. C. 268, following the case of *Daniel, Ex'r, v. The Board of Comm'rs of Edgecombe Co.*, 74 N. C. 494, it was said:

"Defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim when the delay which would otherwise give operation to the statute *has been induced by the request of the defendants, expressing or implying their engagement not to plead it.*" (Syllabus.)

To the same effect see: *Mickey v. The Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494; *Kenackowsky v. Board of Com'rs*, 122 Mich. 613, 81 N. W. 581; *Home Ins. Co. of Texas v. Myer*, 93 Ill. 271.

'Complaint is made that attorneys' fees and taxes are not legitimate elements of damage in cases of this character. We are unable to ascertain from the record that either of these matters entered into the judgment of the district court, and therefore it will be unnecessary to consider the legal questions relating thereto. The judgment is affirmed.

All the Justices concurring.

**JOSEPH LIMB *et ux.* V. THE KANSAS CITY, FORT SCOTT
& MEMPHIS RAILROAD COMPANY.**

No. 14,352. (84 Pac. 136.)

SYLLABUS BY THE COURT.

RAILROADS—*Injury to Trespasser—Contributory Negligence.* A person who for his own convenience walks on the main track of a railroad, and does not look or listen, or take any precaution for his own safety, and while so walking is injured, is guilty of contributory negligence which will bar a recovery of damages for such injury.

Error from Cherokee district court; WILLIAM B. GLASSE, judge. Opinion filed March 10, 1906. Affirmed.

Blue & Hamilton, and *H. A. Forkner*, for plaintiffs in error.

L. F. Parker, and *Pratt, Dana & Black*, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: About March 28, 1900, David Limb, a boy about sixteen years of age, was run over and killed by the cars of the defendant in error, at the town of Scammon, in Cherokee county, Kansas. Joseph Limb and Annie Limb, the parents of the deceased, brought this action, August 3, 1900, in the district court of that county, to recover damages suffered by them on account of the loss of their son. At the trial a demurrer to the evidence was sustained, and a judgment entered for the defendant. The plaintiffs excepted, and bring the case here, assigning this order and judgment of the district court as error.

The facts may be briefly stated, as follow: Scammon is a small mining village located on both sides of the defendant's railroad. Coal-mines are on the east side of the track. Many of the miners live on the west side thereof. The miners, in going to and from their

work, and school children and other citizens have for many years crossed over the railroad-tracks and right of way freely and promiscuously, resulting in paths having become worn in many places. No objection had been made by the defendant to this use of its grounds.

David Limb, the deceased, lived in the west part of town, and had been at work in the mines about four years prior to his death, during which time he passed over and across the railroad-tracks and grounds at his convenience. The depot was situated between the main track on the west and the switch, or house-track, on the east. These two tracks came together about 700 feet south of the depot.

About twenty feet south of the depot platform was a crossing over the main track. Between the house- and main tracks was a traveled pathway extending from a street, which crossed the railroad south of the switch, and ran north to this crossing near the depot. It was convenient for the miners who lived west of the railroad to come from their work up the traveled path between the two tracks to the crossing near the depot and then cross over the main track. There was nothing, however, to prevent them from crossing at any place. About two o'clock in the afternoon of the day of the injury David Limb walked up from the south between the two tracks, near the main track, apparently intending to cross at the crossing near the depot. While so traveling a freight-train came in from the south and passed him. While the train was passing the caboose and a box car were detached from the moving train, but followed after by reason of the momentum acquired before they were detached. The front end of the train passed north beyond the depot. When it passed the deceased the caboose and box car were a short distance behind him, moving slowly north. As soon as the main part of the train passed the deceased apparently assumed that it was the entire train and stepped upon the end of the ties and followed it

without noticing the cars coming behind him. He was soon overtaken by the caboose and box car and run over. The deceased did not look behind him at any time. He was apparently unconcerned and indifferent, as if wholly unconscious of danger.

It was unnecessary for him to go upon the ties. The walking was more convenient on the ground where he had been while the train was passing. He was not attempting to cross the track. He was not between the rails. He was going up the track toward the crossing, and was on the end of the ties just outside of the east rail. He was an intelligent young man, in possession of all of his faculties. He had lived there for years and had been about the depot and grounds daily, and must have been familiar with the movement and management of freight-trains and the methods of switching. A brakeman was on the rear car of the train going north, but no one was on the box car behind the deceased. None of the trainmen saw the deceased after he stepped on the ties and before he was injured.

It is claimed that the deceased had a right to be upon the track and grounds of the defendant by reason of the long-continued use made thereof by the public, without objection, and that the defendant was guilty of negligence in not having some person on the box car to warn people who might be on the track. In the view we have taken of this case it is unnecessary to consider what rights the deceased and others acquired by being permitted to cross and recross the railroad at this place. The deceased was not using the track for crossing purposes. He was walking on the ties along the main track. Whatever use in crossing the tracks had been acquiesced in by the company would not give one the right to travel along the track, and the deceased in so doing was without right and was a trespasser.

Under the former decisions of this court the deceased was clearly guilty of contributory negligence which bars a recovery. The deceased was not upon

the premises of the defendant for any purpose in which it had an interest. He was there solely for his own convenience. It was in the early afternoon, when there was nothing to obscure the vision. When the train was passing the deceased he was walking on the ground in a place of safety, going in the direction of a crossing. Had he continued in his course, as would naturally be expected, he would not have been injured. The rear car on that part of the train which went north with the engine was an empty coal-car. The deceased saw it. He must have known that it was not the rear end of a freight-train. If he had used his ordinary senses he would have known by the absence of the caboose that the train had been cut in two. His conduct was that of extreme indifference and recklessness. He neither looked nor listened; he took no precaution whatever.

It has been frequently decided by this court that persons may not recklessly place themselves in a place of danger and then recover damages because of injuries received thereby. (*Zirkle v. Railway Co.*, 67 Kan. 77, 72 Pac. 539; *Railway Co. v. Schwindt*, 67 Kan. 8, 72 Pac. 537; *Libbey v. Railway Co.*, 69 Kan. 869, 77 Pac. 541; *Railway Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451; *Railroad Co. v. McMinn*, 72 Kan. 681, 84 Pac. 134; *Hoopes v. Railway Co.*, 72 Kan. 422, 83 Pac. 987.) The judgment is affirmed.

All the Justices concurring.

GEORGE M. EDWARDS V. JOSIE M. SOURBEER.

No. 14,413. (84 Pac. 1083.)

SYLLABUS BY THE COURT.

1. **ESTOPPEL**—*Action Brought in the Name of Another—Settlement by Nominal Plaintiff.* One who as attorney brings a proceeding for the unlawful detainer of real estate in the name of another may thereby estop himself to deny that the nominal plaintiff is the real party in interest and therefore entitled to settle the litigation and compromise the subject-matter thereof, although the defendant may have notice that such attorney claims to be himself entitled to the possession of the property; and *held*, that under the facts of this case such an estoppel arises.
2. ——— *Failure to Plead—Consideration on Review.* Where a case is tried as though a question of estoppel were in issue, the fact that it was not formally presented by the pleadings does not prevent its consideration on review.

Error from Meade district court; EDWARD H. MADISON, judge. Opinion filed March 10, 1906. Reversed.

Francis C. Price, and *F. M. Davis*, for plaintiff in error.

R. W. Griggs, and *Peters & Peters*, for defendant in error.

The opinion of the court was delivered by

MASON, J.: Josie M. Sourbeer recovered a judgment against George M. Edwards for damages for the conversion of a crop of wheat, and Edwards prosecutes error.

The land upon which the crop was grown was sold under an order of court by a receiver in April, 1899. It was bought in by R. W. Griggs, a lawyer, for his own benefit, but as a matter of convenience the bid was made in the name of his son, J. R. Griggs. No receiver's deed was made until some time later, but as there was some evidence tending to show that immediate possession was given to R. W. Griggs, and that

Edwards v. Sourbeer.

he was recognized by all persons concerned as the owner, this consideration is not important, and the case may be treated as though he acquired a full title in April, 1899.

Edwards occupied the land for the season of 1899 under an oral lease made with J. R. Griggs, whom he paid in full, R. W. Griggs consenting to this arrangement. In May, 1900, a written lease to Edwards from April 1, 1900, to April 1, 1901, was executed by J. R. Griggs, who signed it, however, "R. W. Griggs by J. R. Griggs," the rent named being \$25. In September, 1900, Edwards sowed a crop of wheat. While he was engaged in the work R. W. Griggs had a conversation with him in which Griggs claimed the ownership of the land, denied the authority of J. R. Griggs to make a lease for it, and said that he wanted it himself. He also offered to pay Edwards whatever expense the latter had incurred in the matter.

The written lease by its terms expired April 1, 1901, but Edwards continued to hold possession with the obvious intention of harvesting the wheat crop. With the equally manifest purpose of preventing this, a proceeding for unlawful detainer was begun against him April 18, 1901, in the name of J. R. Griggs, R. W. Griggs acting as his attorney. A verdict was rendered for Edwards, but an appeal bond was filed and approved. While matters stood in this shape Edwards and J. R. Griggs entered into a written agreement for the settlement of the controversy, providing in substance that the unlawful detainer proceeding should be dismissed and that Edwards should be relieved of any costs of the litigation, should retain the wheat, which he had already harvested, and should pay J. R. Griggs \$52. Edwards made the payment and marketed the wheat.

In March, 1903, Josie M. Sourbeer, a daughter of R. W. Griggs, began this action against Edwards to recover the value of the wheat. She based her title upon the ownership of the land, claiming that in 1899

Edwards v. Sourbeer.

her father had told her she could have it (presumably for an agreed price), and that in July, 1900, she had paid him for it, although she received no deed until after her action was begun. Edwards for his defense relied upon his settlement with J. R. Griggs, claiming that whatever the rights of the different members of the Griggs family may have been among themselves their conduct worked an estoppel to assert against him that the compromise was unauthorized.

Before Edwards cut the wheat and before he made the adjustment with J. R. Griggs he received a notice from Mrs. Sourbeer, signed by her father, with others, as her attorneys, stating that she claimed to own the crop. Mrs. Sourbeer relies upon this fact to charge Edwards with notice of whatever actual rights she had, and seeks to evade the effect of the settlement made with J. R. Griggs upon two theories, namely: (1) That in virtue of her contract with her father for the land, and of her payment to him of the price, she became its real owner in July, 1900, and that therefore nothing that either J. R. Griggs or R. W. Griggs, or both of them, did after that time could affect her rights in favor of any one who had notice of her claim; (2) that at all events she was in effect an assignee of all the rights of R. W. Griggs, and as such entitled to maintain any action that he could have brought, and that he was not bound by the settlement with J. R. Griggs because Edwards when he made it knew that the father was the real party in interest and that the son had no authority to make an adjustment of the controversy.

As to the first contention, this court is of the opinion that Mrs. Sourbeer had no capacity to maintain the action for the conversion of the wheat otherwise than as the successor of whatever rights R. W. Griggs had in that regard. She claims title to the wheat only as the owner of the land. She had no deed until long after the crop had been harvested. While the payment of the purchase-price may have rendered her the

equitable owner of the property, as between her father and herself, she had acquired no standing to be so considered by Edwards. R. W. Griggs had no paper title whatever; J. R. Griggs had no deed, but was shown by the court records to be the purchaser of the land at judicial sale. As to them the absence of formal title is immaterial, because of their possession and of Edwards's dealings with them. But it would be stretching the privilege of an equitable owner to sue for a conversion of a crop too far to extend it to Mrs. Sourbeer, who never had possession of the land and never had any contract with Edwards concerning it. Without attempting to frame any general rule as a test of the right of a mere equitable owner to maintain an action based upon the title to land, we are of the opinion that under the circumstances of this case Mrs. Sourbeer acquired no status as an independent claimant of the crop here in controversy, notwithstanding the notice that was given to Edwards in her name.

It remains to consider the claim of Mrs. Sourbeer in the same light as though it were urged by R. W. Griggs. In this aspect its validity depends upon whether the action of R. W. Griggs in conducting the unlawful detainer proceeding as attorney for his son created a conclusive presumption as against him that the plaintiff was authorized to contract for the settlement of the litigation and the adjustment of the subject-matter there in dispute, and thereby estopped him to deny the validity of the compromise that was effected. It is to be said that Griggs, senior, was not merely an attorney in the case. It appears from his own testimony that the proceeding was brought by him for his own benefit, and that the name of his son was used as plaintiff merely because at the time he began it he had the mistaken impression that the lease had been executed in the name of J. R. Griggs. On the other hand, he claims that Edwards knew that the plaintiff was only a nominal party. The sole testimony in support of this contention was that before the ad-

Edwards v. Sourbeer.

justment was made the younger Griggs was overheard to tell Edwards that he had no interest in the land and could not settle the litigation. Edwards admitted that he had heard that the two Griggses had had a falling out. These considerations, however, cannot overcome the effect of the facts already recited. The pleadings in behalf of the plaintiff in the unlawful detainer action were drawn upon the theory that J. R. Griggs owned the real estate and that Edwards had entered it as his tenant. When R. W. Griggs, notwithstanding his former protest, elected to bring an action in his son's name, alleging that the plaintiff was the owner and therefore entitled to possession of the land, he clothed him with authority not only to settle the litigation but to make an adjustment of the controversy it involved, and justified the defendant in relying upon that authority and entering into a compromise designed to end the whole matter. It is needless to inquire what circumstances might have changed the situation of the parties so that Edwards would no longer have been protected by a settlement made with the younger Griggs. It is enough to say that the facts already stated were insufficient to have that effect.

It is argued in behalf of the defendant in error that Edwards cannot rely for recovery upon equitable estoppel because he did not plead it. The record discloses, however, that the case was tried as though the question of estoppel was in issue, and the fact that it was not formally presented by the pleadings is therefore unimportant.

It results from these conclusions that the judgment must be reversed. The cause is remanded for further proceedings in accordance with the views here expressed.

• All the Justices concurring.

JOHN PAGE V. W. L. HARPER *et al.*

No. 14,468. (84 Pac. 1024.)

SYLLABUS BY THE COURT.

73 229
579 481

SURETYSHIP—*Sale and Purchase of Securities by a Cosurety—Accounting for Profits.* Where one receives the assignment of promissory notes as security to himself and cosureties for an indebtedness of their principal and converts such notes into a judgment in his own name, and thereafter causes execution to be issued on such judgment and levied on certain real estate, and, at the sheriff's sale thereunder, buys the land at a nominal price and takes the sheriff's deed therefor in his own name, and thereafter, jointly with one of his cosureties, buys notes secured by a trust deed on such real estate and causes the land to be advertised and sold by the sheriff under such trust deed, and buys the land at the sheriff's sale and takes the sheriff's deed thereto jointly with such cosurety, and thereafter rents such real property, and finally sells the same to an innocent purchaser—when all this is done without the knowledge or assent of another cosurety, who has paid a part of the principal's debt, and without the knowledge or assent of the principal, the sureties so buying and selling the real estate are liable, in a suit for an accounting, to account to their principal and their cosurety for the profits of the entire transaction, including the buying, renting, and selling.

Error from Cherokee district court; WILLIAM B. GLASSE, judge. Opinion filed March 10, 1906. Reversed.

STATEMENT.

IN 1893 defendant in error W. L. Harper, who is also a cross-petitioner in error, became the agent of the Ætna Powder Company at Galena, Kan., probably to sell the goods of the company on commission. At any rate Harper gave a bond, with Page, Leeman and Prehm as his sureties, conditioned that he would pay the company all the moneys which might become due to it from him as agent. About two years thereafter Harper had become indebted to the company in the sum of \$3791.40, and the company called upon his sureties to settle the debt, which they did on July 25,

1895, by giving their four joint promissory notes for \$947.85 each, to become due in six, twelve, eighteen and twenty-four months, respectively, and bearing interest at six per cent. from date.

To indemnify his sureties Harper assigned to one of them (Leeman) a large number of notes and accounts, under an agreement that the same were to be collected by Leeman as far as possible and the proceeds applied to the payment of Harper's debt to the powder company, the remainder, if any, to be returned to Harper. Harper also secured the indebtedness by a real-estate mortgage to Page, another of the sureties. The mortgaged land was afterward sold and the proceeds properly applied, as to which there is no controversy.

Leeman was able to make but slow progress in the collection of the notes and accounts, and the sureties had in the first instance to pay the greater part of the indebtedness, which was afterward repaid, in part, from the proceeds of the sale of the mortgaged land. Page was unable to meet his portion of some of the notes as they became due, but later he paid to Leeman and Prehm the portion they had advanced for him.

Among the claims assigned by Harper to Leeman to indemnify the sureties were some notes against one Harden, who resided in Missouri, and these were sued upon by Leeman and judgment was procured against Harden for something over \$1000. Leeman caused execution to be issued thereon and to be levied on a business lot and building in Carterville, Mo. At the sheriff's sale Leeman bought the property for \$10, and took the sheriff's deed in his own name. Leeman then took his cosurety Prehm into the deal, and together they bought some notes for about \$1500 which were secured by a trust deed on this property, caused the property to be advertised and sold under the trust deed, bid it in, and took a sheriff's deed in their own names jointly. Thereafter they rented the property, receiv-

ing, it is claimed, about \$700 as rent, and then sold it for about \$5300.

This suit was brought by Page against his cosureties, Leeman and Prehm, for an accounting of the proceeds of the Harden judgment and the Carterville property. Harper, being made a party defendant, filed a cross-petition for the same purpose.

The case was tried without a jury and judgment was rendered in favor of Page for \$59.07, being his portion of \$300, less some costs or expenses, which had been received by Leeman and Prehm from the sale of the balance of the Harden judgment to Mrs. Harden. Judgment was rendered against Harper, and the costs were divided. Page brings the case here, and Harper files a cross-petition in error.

Sapp & Wilson, for plaintiff in error.

A. L. Majors, for cross-petitioner in error, *W. L. Harper*. *Sapp & Brown*, for defendants in error, except *W. L. Harper*.

The opinion of the court was delivered by

SMITH, J.: Eleven assignments of error are made by the plaintiff in error, Page, and thirteen by the cross-petitioner in error, Harper. There is, however, practically only one question presented for consideration, viz., Should Leeman and Prehm account to Harper and Page for the profits received from the Harden property, including the rents and the amount received from the sale of the property, deducting expenses and amounts paid in perfecting title? The issue on this question was fairly presented by the petition and cross-petition, which alleged the facts as above recited. To these pleadings the defendants Leeman and Prehm answered by general denial only.

The relation of the several parties as above recited is established by uncontroverted evidence, and is admitted by the brief of defendants in error, but they say there was no evidence that Leeman agreed to act

as trustee for Harper and Page in the purchase at the execution sale, or that Leeman and Prehm agreed to act as such trustees in the purchase of the trust deed and the notes secured thereby or in purchasing the property at the sale had thereunder. No such agreement was necessary. Their admitted former relation to their principal and cosurety, and to the judgment debt, on which it was their duty to realize as much as possible, made Leeman, at least, such trustee, and Prehm also if, as it is to be presumed, he knew all the facts.

When the owner of a judgment or mortgage lien on land, or one who represents such owner, bids at a sale ordered to satisfy such lien, the very fact that the one who makes such bid may raise it to the entire amount of such lien without the investment of an additional dollar often gives such bidder a decided advantage over other bidders, who must back their bids with their cash; especially is this true where the lien or the lien and prior liens approximate or exceed the value of the property. Thus other bidders are deterred from competing in the uneven contest and often refuse to bid at all. It is unconscionable that one who stands in the place of the owner, as Leeman did in this case, the judgment being in his name, should be allowed to take such advantage of his position to the detriment of his principal, and probably to the detriment of the judgment debtor also. (*Case v. Carroll*, 35 N. Y. 385, 388; 1 Beach, Trusts & Trustees, § 100.)

That Leeman held the lien in trust for himself, his cosureties and Harper will not be questioned. He held the property, which he acquired to an advantage, through his relation to such lien; and must hold the same in the same way he held the lien. (*Winkfield v. Brinkman*, 21 Kan. 682.) The trust in the land arises by implication of law from the facts and circumstances of the case. (*Bank v. Woodrum*, 60 Kan. 34, 55 Pac. 330.) In an analogous situation it is said:

"The *cestuis que trust* may call him to an account

. . . having an option to make him replace it [the property—in this case to set aside the sale of the land] or, if it is for their benefit to affirm his [their] conduct and take what he has sold it for, they may take that and charge him with legal interest." (1 Beach, Trusts & Trustees, § 184.)

The court excluded evidence of the rents and price received on the sale of the property, and sustained a demurrer to the evidence of the cross-petitioner, in opposition to the views herein expressed. The judgment as to both the plaintiff in error and the cross-petitioner in error is reversed, and a new trial is awarded in accordance with the principles expressed in this opinion.

All the Justices concurring.

THE UNION PACIFIC RAILROAD COMPANY V. ELARANDA
A. J. BROWN.

No. 14,477. (84 Pac. 1026.)

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Question of Law or Fact.* When the facts upon which a question of negligence depends are in dispute, the question is one to be answered by the jury under proper instructions; but where the facts are not in dispute, and only one inference or deduction is to be drawn from them, they present a question of law for the court. (*Dewald v. K. C. Ft. S. & G. Rld. Co.*, 44 Kan. 586, 24 Pac. 1101.)
2. RAILROADS—*Opening Vestibule before Station is Reached.* When a passenger-train of vestibuled coaches is approaching a station where passengers are to leave the train, and after the brakemen have called the name of the station to passengers who may desire to alight, it is not negligence for the trainmen to open the side door and the floor door of a vestibule and leave them while open till the station is reached.

Error from Dickinson district court; OSCAR L. MOORE, judge. Opinion filed March 10, 1906. Reversed.

Railroad Co. v. Brown.

STATEMENT.

THIS action was brought by the defendant in error against the plaintiff in error to recover damages for the negligence of the railroad company and its employees, resulting in the death of her husband, J. W. Brown. A trial was had to a jury, and they returned a verdict in favor of the plaintiff for \$1000. Each party filed motions for a new trial, both of which were denied, and judgment in accordance with the verdict was rendered against the company. It brings the case here for review.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error.

Edward C. Little, for defendant in error; S. S. Smith, of counsel.

The opinion of the court was delivered by

SMITH, J.: The husband of the plaintiff, who lived at Abilene, was returning from Kansas City to his home in a train of vestibuled coaches on the Union Pacific railroad. Within a short distance of the station at Abilene the whistle was sounded, and a brakeman went through the smoking-car, at least, and called the name of the station. A witness who had been asleep in the smoking-car was awakened by the whistle, or by the call of the brakeman, and arose, put on his overcoat and went to the rear end of that car, and, looking through the glass in the door of the car, saw the deceased standing within the vestibule of the smoking-car, and also saw that the side and floor doors of the vestibule on the same side of the train as the Abilene station were open. The vestibule was light, and the deceased could have seen, if he had looked, that it was open. The witness looked in another direction—perhaps in search of a drink of water—for a short time, and when he again looked into the vestibule the deceased was gone. Soon after the train had passed the

Railroad Co. v. Brown.

deceased was found with his legs lying across the north rail of the track, cut off, and he was otherwise mangled. He died in a few hours. This is all that the evidence shows as to the cause of the accident. It is not shown who opened the vestibule, nor is it shown whether the deceased was walking in his sleep or was awake and alert—whether he walked off the train or fell off. All is conjecture.

The burden of showing negligence is generally upon the plaintiff who asserts it as his ground of recovery, but where there are no witnesses to a death which occurs to a passenger of a common carrier for hire, and circumstances are proved sufficient to justify the conclusion that the cause of the death was wrongful, the jury may infer ordinary care and caution on the part of the injured person from the love of life and the instinct of self-preservation.

Is there, then, enough evidence in this case to justify the inference that the death was caused or contributed to by any wrongful act on the part of the trainmen? All that they did and all the movements of the train were susceptible of proof. It is the movements and the cause of the movements of the deceased which are conjectural. The only witness whose knowledge of the circumstances is at all intimately connected with the accident is Sheriff Baker, who stood upon the floor of the car with only a glass door between him and the floor of the vestibule where the deceased stood; and, as his attention was almost immediately called to the disappearance of the deceased, he could not have failed to remember any sudden lurching, sudden stopping or starting of the car which would have accounted for the (to him) mysterious disappearance of the deceased. An illegally high rate of speed is one of the grounds upon which negligence is sought to be imputed to the railroad company, and there is evidence that the train, at the time of the accident, was moving twelve to fifteen miles per hour, while the ordinance of the city prohibited a greater speed than ten miles per hour

within the city limits. There is no evidence, however, that this was a contributing cause of the accident. Inferentially the evidence of Baker is to the contrary.

The plaintiff produced all the evidence relating to negligence that was produced, and there is no conflict as to any fact. Where there is a conflict of evidence and the facts are in dispute, whether there was negligence is a question of fact for the jury under proper instructions; but where the facts are undisputed, and only one inference is to be drawn from them, the question of negligence is one of law for the court. (*Dewald v. K. C. Ft. S. & G. Rld. Co.*, 44 Kan. 586, 24 Pac. 1101.)

Since no fault in the running or management of the train is shown to have caused or contributed to the accident, there remains only to consider whether or not the opening of the vestibule or leaving it open constituted negligence on the part of the trainmen. In the absence of evidence as to when and by whom the vestibule was opened we assume that it was opened by one of the trainmen whose duty it was to open it at the proper time to enable passengers to enter or leave the train at the station. Whether it was open for a considerable length of time before the witness Baker saw it after he had been aroused from sleep by the station call, and had put on his overcoat and gone to the rear door of the smoker, is immaterial in this case. It had neither caused nor contributed to any injury prior to that time. We will then assume that it had been opened just prior to the time Mr. Baker saw it open and after the brakeman, by calling the station, had notified the passengers desiring to leave the train at Abilene to be prepared so to do.

As a question of law, does it endanger the safety of the passengers, and *per se* constitute negligence, to open the vestibule at such time? On the other hand, is it not the only orderly and proper way to conduct the business for the safety and convenience of the passengers?

It is in evidence in this case, and is a matter of general knowledge, that, on fast trains especially, when they hear their station called, passengers who "don't forget their packages" get their belongings and go into the vestibule prepared to alight immediately upon the stopping of the train. It is also generally known that incoming passengers are detained until the outgoing have alighted. If the vestibule must be kept closed until the train comes to a full stop it would often be difficult to open it at all. It would discommode passengers and delay trains. Passengers at such times enter a vestibule expecting to see the exit open, and if they find it closed immediately seek another.

That a passenger may fall from an exit opened for his accommodation, as possibly the deceased did in this case, is no argument against the timely opening. There is danger in every step of life, from the first toddling effort of the infant to the last of the octogenarian; danger in standing, danger in sitting, danger in lying, danger in eating, danger in fasting, danger in sleeping, danger in waking. There is no moment of life, active or inactive, on land or on sea, when danger is not near. It is omnipresent. When we consider how easily we fall, what trifling incidents, what invisible microbes end our lives, it is a wonder we ever take the first step; it is a miracle that we attain three score and ten years, not to mention one hundred.

Since danger can in no way and nowhere be absolutely avoided, it would be unreasonable to impose upon a common carrier the discontinuance of a practice or mulct it in damages for the doing of an act which accommodates and, by saving them time, lengthens the lives of thousands because in one instance it may have contributed to the shortening of the life of one. It is necessary to the efficient and orderly conduct of the business of carrying passengers in vestibuled railway-coaches, and necessary for the convenience and accommodation of the passengers, that the vestibules be opened before the stopping of trains at

Douglas County v. Woodward.

stations; and, as the practice does not expose the passengers to any considerable danger, the opening of a vestibule at any time after the usual call for a station is not, under ordinary circumstances, and was not in this case, *per se* negligence.

The judgment of the district court is reversed, and the case is remanded.

All the Justices concurring.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF DOUGLAS *et al.* v. EMILY P. D. WOOD-
WARD.

No. 14,478. (84 Pac. 1028.)

SYLLABUS BY THE COURT.

1. STATUTORY CONSTRUCTION—*Prospective or Retrospective Operation.* Generally, a statute will be construed as applying to conditions that may arise in the future. An act will not be given a retrospective operation unless the intention of the legislature that it shall so operate is unequivocally expressed.
2. JURISDICTION—*Settlement of a Case-made.* Section 4 of chapter 320 of the Laws of 1905 is prospective, and not retrospective, in its operation, and confers no power upon a trial judge who had, prior to the passage of the act, lost jurisdiction to settle a case-made.

Error from Douglas district court; CHARLES A. SMART, judge. Opinion filed March 10, 1906. Dismissed.

M. A. Gorrill, Thomas Harley, and J. Q. A. Norton, for plaintiffs in error.

Bishop & Mitchell, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: In this case there is a motion to dismiss. The judgment from which this proceeding in error arises was rendered December 31, 1904. A motion

73	238
74	891
74	896

for a new trial was denied on the same day, and an order entered extending the time sixty days to make and serve a case-made, with ten days thereafter for the suggestion of amendments, the case to be settled upon five days' notice. The case was served on the 24th day of February, 1905, and settled and signed March 22, 1905. The term of the Honorable Charles A. Smart, the judge who tried the case, expired January 9, 1905. He succeeded to the office and his second term began on the same day. The sixty days' extension expired March 1, 1905, and the ten days to suggest amendments, March 11, 1905. It will be observed that no definite time was fixed in the order of extension within which the case should be settled, but it was to be settled on five days' notice, which meant at any time within the year, upon such notice. In *Mowery v. Bank*, 67 Kan. 128, 72 Pac. 539, it was said:

"When no time is fixed for the settlement of a case for this court at the date of the expiration of the regular term of office of the trial judge who tried the case, such trial judge does not have jurisdiction thereafter to settle the case, although by appointment he becomes his own successor in office." (Syllabus.)

(See, also, *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496; *Insurance Co. v. Harn*, 69 Kan. 249, 76 Pac. 822; *Zinc Co. v. Dwight*, 69 Kan. 852, 76 Pac. 1130; *Robbins v. Mackie*, 70 Kan. 646, 79 Pac. 170; *St. L. & S. F. Rly. Co. v. Corser*, 31 Kan. 705, 3 Pac. 569; *K. & C. P. Rly. Co. v. Wright*, 53 Kan. 272, 36 Pac. 331.)

It is insisted, however, that since these decisions were made the legislature has provided for cases falling within the facts here involved by section 4 of chapter 320, Laws of 1905. The part of the section referred to reads as follows:

"Provided, however, that the judge of the district court or judge *pro tem.* before whom a case has been or shall be tried shall have power to sign and settle a case-made within one year from the making of any final order or rendering any final judgment, if the same has been legally served upon the adverse party,

notwithstanding that the term of office of any such judge or judge *pro tem.* may have expired after the rendition of such judgment or making such order and before such case-made may have been settled, provided such case-made has been served within the time previously fixed by such judge or judge *pro tem.* of such court."

The main question involved in the motion to dismiss is, Does the law of 1905 operate retrospectively, so that a trial judge whose term of office expired prior to the passage of the act is given power to settle a case-made properly served within the time fixed by him in the order of extension, even where no definite time was fixed in the order of extension in which the case should be settled? Neither side has argued this question. Plaintiffs in error assume that the act of 1905 covers the case, and suggest that defendant in error must have overlooked this provision.

In some of the states the constitution provides that no law shall be given a retrospective operation. Our constitution is silent upon the subject. In the absence of any constitutional inhibition the legislature has the power to enact retrospective statutes in certain cases, provided such laws do not interfere with vested rights. Whether vested rights are affected by such laws it is the province of the courts to determine. (Potter's Dwarrris, Stat. & Const. 166.) The rule is that they are not to be allowed a retroactive effect unless such intention upon the part of the legislature is so clearly expressed that no other construction can be fairly given. (*Rogers v. Inhabitants of Greenbush*, 58 Me. 395, 4 Am. Rep. 292.) Generally, a statute prescribes a rule for future action. (*Prouty v. Stover, Lieut.-governor*, 11 Kan. 235.)

In the case of *Lawrence v. City of Louisville*, 96 Ky. 595, 29 S. W. 450, 49 Am. St. Rep. 309, 27 L. R. A. 560, it was said:

"While retrospective legislation may, in some cases, be upheld, the words of a statute ought not to have a retrospective operation unless they are so clear and

imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." (Syllabus.)

"The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. And although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." (Potter's Dwarries, Stat. & Const. 162, note.)

To the same effect see *Gerry v. Inhabitants of Stoneham*, 83 Mass. 319; *Garfield v. Bemis*, 84 Mass. 445; *Loring and another v. City of Boston*, 78 Mass. 209; *John O. Kinsman v. City of Cambridge*, 121 Mass. 558; *Atkinson v. Dunlap*, 50 Me. 111; *Bryant v. Merrill*, 55 Me. 515; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238; *Dobbins et al. v. First Nat. Bank*, 112 Ill. 553; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137. In the last-named case it was said, at page 607:

"Retrospective laws are not looked upon with favor. Statutes are usually construed as operating on cases which come into existence after the statutes are passed, unless a retrospective effect is clearly intended. (Endlich, Interp. of Stat., §§ 271, 273, 275, 276.)"

The authorities are collated in section 642 of volume 2 of the second edition of Lewis's Sutherland on Statutory Construction.

Keeping in mind the rule that a statute must be given a prospective instead of retrospective operation, unless the legislative intention to the contrary so clearly and imperatively appears that no other meaning can be attached to the terms, or unless the intention of the

legislature cannot be otherwise satisfied, how can it be argued that this statute should be given a retrospective effect? Is it because the words "has been" are employed? These words apply to different classes of cases: (1) To a case to be tried in the future, of which it may be said at a future time that it "has been" tried; (2) to a case which at the time the act took effect had been tried, and of which the trial judge still had jurisdiction to settle; and (3) to a case which when the act took effect had been tried, but of which the trial judge had lost all jurisdiction. Obviously, the first and second classes are within the purview of the act; but the third, which is the class in which this case belongs, is not, unless we give to the statute a retroactive operation—which courts are loath to do—and also give to it sufficient force to breathe life into a dead thing. Moreover, if it were the intention to have it apply only to cases arising in the future, the very language used seems most appropriate. It must be construed as if it read: "*At any time in the future*; provided, however, that the judge of the district court or judge *pro tem.* before whom a case has been or shall be tried," etc. If we do not lose sight of the rule that the words must be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed, we readily see that this statute cannot be given a retroactive operation without violence to this rule of construction.

In *Dyer v. Belfast*, 88 Me. 140, 33 Atl. 790, an act which provided that when any person aggrieved by the estimate of damages for land taken for a public way honestly intended to appeal therefrom, but by accident or mistake omitted to take his appeal within the time allowed by the law, he might at any time within six months have an appeal by applying to any judge of the supreme court, was held not to apply to a case where the right of appeal had been fully barred before its enactment. It was held in *Loring and another v. City of Boston*, 78 Mass. 209, that a statute

did not revive a claim for damages for land taken to widen a street, which claim was barred before the act was passed. In *Kinsman v. City of Cambridge*, 121 Mass. 558, it was held that a statute extending the time for a landowner to file a petition for a jury to assess damages for land taken for a street did not revive a cause of action barred by the statute of limitations before the passage of the act. A statute extending the time for filing a petition for review was held, in *Atkinson v. Dunlap*, 50 Me. 111, to be prospective in its operation. To the same effect see *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Albert C. Sammis v. James Bennett*, 32 Fla. 458, 14 South. 90, 22 L. R. A. 48.

In the case at bar the difficulty lies in the fact that under the previous rulings of this court the jurisdiction of the trial judge to settle the case ended March 11, 1905. The act of 1905 took effect March 21, 1905. Whatever may be said of the power of the legislature to enact retrospective laws, an act will not be given a retrospective operation so as to infuse life into proceedings which have lapsed and become absolutely void for want of jurisdiction unless such was clearly the intention of the legislature. If the intention of the legislature had been to have this statute affect cases where the jurisdiction of the judge who tried the case had been lost, apt words would have been employed to indicate such purpose.

Counsel in a similar case which is pending have called our attention to *Johnson v. Higgins*, 53 Conn. 236, 1 Atl. 616, as authority for holding that the legislature has the power to confer upon a former judge who has tried a cause authority to perform judicial powers necessary to permit a litigant to perfect an appeal. In that case a judge resigned his office March 7. On March 31 an act was passed which authorized a former judge to perform the acts in question. Subsequently he did so. The court upheld the constitutionality of the act. If the legislature has authority thus

Douglas County v. Woodward.

to confer upon a person who has been judge, but whose term of office has expired, the judicial power to perform the duties and functions of a judge, the question might arise, Why may not the legislature confer the same powers upon one who has never occupied that office, or upon any person they may deem suitable? Without deciding the extent of the power of the legislature to confer such authority upon one who is no longer a judicial officer, the fact which controls us is that the act itself does not appear to have been intended to have any such purpose.

We have carefully considered the effect of the act of 1905, realizing that, aside from the importance to the parties and the public of the case at bar on its merits, there are pending other cases involving property rights in which the jurisdiction of this court depends upon the construction placed upon this act. We are of the opinion that, inasmuch as the trial judge had lost all jurisdiction to settle the case before the act of 1905 took effect, that act was powerless to infuse life into the proceedings, or confer upon him authority to act further. The act cannot be given a retrospective operation. Its language nowhere indicates such an intention upon the part of the legislature. The motion to dismiss is allowed.

All the Justices concurring.

JAMES M. GILLE V. MYRA B. ENRIGHT *et al.*

No. 14,508. (84 Pac. 992.)

SYLLABUS BY THE COURT.

1. **MORTGAGES—Foreclosure—Effect on Junior Lien.** Real estate which has been once sold on an order of sale issued pursuant to a judgment of foreclosure, in a suit upon a note and a mortgage securing the same, cannot again be sold upon a judgment lien inferior thereto, under which the holder of the judgment had a right to redeem within fifteen months after the foreclosure sale.
2. **JUDICIAL SALES—Title of Purchaser at Second Sale, under an Inferior Lien.** Where, under the conditions set forth in the foregoing paragraph, an inferior judgment creditor causes execution to be issued and levied on the real estate so previously sold, and procures a sheriff's deed to be issued to himself thereon, he acquires no title thereto and has no standing to complain of any judgment which may be rendered in a suit brought by one in possession, after his right of redemption has expired, to quiet the title to the real estate.

Error from Wyandotte district court; J. MCCABE MOORE, judge. Opinion filed March 10, 1906. Affirmed.

Roland Hughes, and *Junius W Jenkins*, for plaintiff in error; *T. A. Witten*, of counsel.

Winfield Freeman, *E. A. Enright*, and *James H. Austin*, for defendants in error.

The opinion of the court was delivered by

SMITH, J.: The essential facts in this case are as follow: In October, 1898, A. R. Ridenour commenced a suit against Mrs. Carrie L. Emmons and her husband, D. R. Emmons, on a promissory note given by them, and to foreclose a mortgage on certain real estate owned by Mrs. Emmons which had been given by them to secure the payment of the note. A personal judgment was rendered against Mrs. Emmons and her husband, and a judgment of foreclosure and order for the sale of the real estate was entered. Under

Gille v. Enright.

the order of sale the sheriff sold the land, on May 22, 1899, to one Hobbs, and issued Hobbs a certificate of sale therefor. On May 3, 1900, the plaintiff in error, James M. Gille, obtained a general money judgment against Mrs. Emmons for a large sum, and caused execution to be issued thereon and levied on the same real estate that had been sold under foreclosure. Under this execution the sheriff sold the real estate to Gille, on September 23, 1901. On April 9, 1903, after confirmation of the sale, the sheriff made his deed for the real estate to Gille.

On November 27, 1903, Myra B. Enright commenced this suit to quiet title, claiming ownership of the real estate under a deed from Hobbs, and alleging that she was in possession thereof. Gille and others were made parties defendant.

It appears that Mr. Emmons, within four or five months after the sale to Hobbs, made an arrangement with Hobbs for an assignment of the certificate of purchase and repaid a portion of the purchase-price, and paid all he agreed to pay Hobbs for the assignment before Hobbs procured the sheriff's deed and conveyed the land, at Mr. Emmons's request, to Enright. Gille claims this transaction amounted to a redemption of the real estate by Mrs. Emmons, through her husband. Many other questions are raised as to the validity of the sheriff's deed to Hobbs after Hobbs had equitably, at least, parted with all his interest in the land; as to the validity of the deed from Hobbs to Enright, and as to the deposit of the purchase-price in escrow, to abide the result of this suit, instead of paying it to Hobbs or Emmons. It is also contended that Emmons could not thus divest his wife of her title to the land. We regard none of these questions as material. Section 4949 of the General Statutes of 1901 reads:

"Real estate once sold upon order of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or

Gille v. Enright.

decree under which the same is sold, or any judgment or lien inferior thereto, under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for."

The land was sold to Hobbs on May 22, 1899, and Gille obtained his judgment against Mrs. Emmons on May 3, 1900, eighteen days before his right to redeem as a creditor began. The lien of his judgment was inferior to the lien upon which the land was sold, and he had three months within which he could have redeemed it. It is clear that the second sale, under which he claims title to the land, was forbidden by the statute and was void. (*Case v. Lanyon*, 62 Kan. 69, 61 Pac. 406.)

Gille did not claim he was in possession of the land, and as he has no right or title to it he has no standing to complain of any ruling or decision of the court in reference thereto. If Mrs. Emmons had redeemed the land, as he claims she in effect did, after his right to redeem had attached, he would have no better standing.

The order of the district court granting a new trial is affirmed.

All the Justices concurring.

73	248
74	323
73	248
79	583

**THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
V. HOMER McLAUGHLIN *et al.***

No. 14,510. (84 Pac. 989.)

SYLLABUS BY THE COURT.

DAMAGES—Death by Wrongful Act—Excessive Verdict. In an action for damages for death by wrongful act it appeared that the deceased at the time of his death was sixty-six years of age, unmarried, with no one legally dependent upon him, and that he was a farmer, living on leased land, and owned nothing except a small amount of personal property. The plaintiffs, to whom he had made casual gifts, were his nephews and nieces, all in comfortable circumstances, whose ages ranged from twenty-one to forty years. A verdict for \$7000, under all the circumstances and facts in evidence, was excessive and should have been set aside.

Error from Labette district court; THOMAS J. FLANNELLY, judge. Opinion filed March 10, 1906. Reversed.

STATEMENT.

ON the 22d day of October, 1903, J. G. McLaughlin received injuries by a fall from a depot platform of the Missouri, Kansas & Texas Railway Company at Chetopa, in Labette county, from the effects of which he died within a few days thereafter. At the time of his death he was sixty-six years old, and unmarried. He was the uncle of the plaintiffs, of whom two are his nephews and five his nieces. This is a proceeding in error from a judgment in their favor for \$7000.

The deceased was a farmer, and lived in the Indian Territory. The father of the plaintiffs died about five years before the uncle. After the father's death the widow, the two sons and one daughter, then unmarried, moved to the uncle's place and lived with him. At the time of his death the nephews and their mother were still living with him, the niece having married and moved away. The ages of the plaintiffs were as follow: Homer, the youngest, reached twenty-one in the March following his uncle's death, Mrs. Alton was

twenty-three, James twenty-nine, Mrs. Bracken twenty-seven, Mrs. Simmons thirty-five, Mrs. Dwelley thirty-seven, and Mrs. King forty. All the nieces are married, and the testimony shows that they are all in prosperous circumstances. The deceased owned no land, and at the time of his brother's death was living alone on leased land in Indian Territory. He then owned fifteen head of horses, a few hogs, and some farming implements. The widow of his brother, with her two sons, owned and brought to the place seven head of horses, fifteen or twenty hogs, and a few cows. After that some of the stock were owned in partnership, and at his death the deceased owned, in addition to some horses, an interest (the exact share or amount no witness appeared to know) in twenty-five hogs and ten cows. When his brother's family came to live with him none of the land he occupied was in cultivation. One hundred acres were then broken out by the nephews and their uncle and farmed for a few seasons, when they all moved to another piece of leased land. Very little of this was in cultivation at the time of the uncle's death. Homer McLaughlin testified as follows:

"Ans. There was no plowing done. There were about thirty acres tillable land.

"Ques. After you moved on this last place, how much did you plow of that? A. Never plowed any. We listed that.

"Q. How much stock did you have on this last place? A. At that time I guess we had—my brother and I had about ten head of horses, and my uncle had about twenty head.

"Q. And how much other stock? A. Had ten head of cows and about twenty-five head of hogs.

"Q. Who had these cows; to whom did they belong? A. To my sister and my mother and we boys.

"Q. And you boys? A. Yes, sir.

"Q. What else did you have on the place there? A. Had hogs.

"Q. How many hogs did you have? A. About twenty-five head, I guess.

"Q. Did they belong to you and your mother and your brother? A. And my uncle.

"Q. How many belonged to your uncle? A. I can't say how many. We had them in partnership.

"Q. How much stuff did your uncle have on the place there? A. Of his own stock, you mean?

"Q. I mean of his own stock. A. I can't say. He had about twenty head of horses, and some hogs, and some farming implements."

There was testimony showing that from the time of their father's death the uncle had managed and looked after the affairs of the plaintiffs who went to live with him, and to some extent had given them a father's advice and counsel. The work on the farm was done by the nephews, but the deceased had general charge of matters, leased the land and sold the products, giving to the nephews what money they required. Homer testified that he had received from his uncle as much as \$100 in one year. The deceased also made casual gifts of money to some of the other plaintiffs; to one of the married nieces he gave ten dollars at one time, and on other occasions smaller sums. He had given to one of the nieces a horse, and had promised her money for a piano.

John Madden, and W. W. Brown, for plaintiff in error.

Houston & Brooks, for defendants in error; Francis M. Brady, of counsel.

The opinion of the court was delivered by

PORTER, J.: Numerous errors are complained of, but we shall consider only the claim that the damages allowed are excessive. The deceased was by occupation a farmer, interested as a partner with his nephews and their mother in the ownership of twenty-five hogs and ten head of cows, and in the operations of a farm, which was leased land. The farming was very limited, only thirty acres of the place being tillable. In addition, he had twenty head of horses of his

Railway Co. v. McLaughlin.

own and some farming implements. He owned no land, and possessed no other property of any kind. There is nothing in the evidence showing the kind, quality or value of the live stock in which he was interested, or the amount of sales of stock or produce, or the amount of earnings from his personal exertions in his business or occupation. One witness testified that the earnings of deceased from his business or occupation amounted to from \$1500 to \$2000 a year; but this was a mere conclusion of the witness, which is disputed by the testimony in reference to the slight farming operations carried on, and the small possessions which the deceased had accumulated.

Where income is taken as a test or standard of the measure of damages, in a case of this kind, the income considered must be that which was derived from the personal exertions of the deceased in his business or occupation, as distinguished from income arising from property owned or investments of capital. (*Railway Co. v. Posten*, 59 Kan. 449, 453, 53 Pac. 465; *Railway Co. v. Scheinkoenig*, 62 Kan. 57, 61 Pac. 414.) The theory of the law is that those who inherit from the deceased acquire his property and investments, and are enabled to secure for themselves the ordinary income therefrom. (*D. & R. G. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211; 4 Suth. Dam., 3d ed., § 1267; *Gulf, Col. and S. F. Ry. v. Younger*, 90 Tex. 387, 38 S. W. 1121; *Pym v. G. N. Railway Co.*, 2 B. & S. [Eng. Q. B.] 759.)

The loss which plaintiffs suffered by the death of their uncle was not the loss of something which they were legally entitled to receive; it was the loss of something which it was merely reasonably probable they would receive. It includes the loss by them of any pecuniary benefit which they might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that he would have added to his estate had he lived his natural life, and which they

Railway Co. v. McLaughlin.

probably would have received by inheritance. The recovery is based upon evidence of pecuniary benefits conferred by deceased in his lifetime, the continuance of which might reasonably have been expected, together with evidence showing the probability that deceased would have accumulated property had he lived which would probably have gone by inheritance to plaintiffs. (*Tiffany, Death by Wrongful Act*, § 158.) The measure of damages, therefore, is what the deceased would probably have accumulated in his business or occupation for the probable period of his life. (*Balt. & Ohio R. R. Co. v. Wightman's Adm'r*, 29 Gratt. [Va.] 431, 26 Am. Rep. 384; *Pym v. G. N. Railway Co.*, 2 B. & S. [Eng. Q. B.] 759; *Railroad Co. v. Barron*, 72 U. S. 90, 18 L. Ed. 591; *McAdory v. Louisville & Nashville Railroad Co.*, 94 Ala. 272, 10 South. 507.) The action is for pecuniary compensation only. (*A. T. & S. F. Rld. Co. v. Weber, Adm'r*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Railway Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603; *Railway Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837.) In *Railroad Company v. Sweet*, 60 Ark. 550, 31 S. W. 571, the proper way to estimate the damages was said to be:

"By taking into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time; deceased's earning power, rate of wages, and the care and attention which one of his disposition and character may be expected to give his family—all these are proper elements for the consideration of the jury in determining the value of the life taken. From the amount thus ascertained the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict. (4 Suth. Dam., 3d ed., § 1268; *Central Railroad v. Rouse*, 77 Ga. 393, 3 S. E. 307; *Balt. & O. R. Co. v. Wightman*, 29 Gratt. [Va.] 431, 26 Am. Rep. 384; *Field, Dam.* § 632; *Mansfield & Co. v. McEnrey*, 91 Pa. St. 185, 36 Am. Rep. 662.)"

To the same effect see *Railway Co. v. Moffatt*, 60

Kan. 113, 55 Pac. 837, and *K. P. Rly. Co. v. Cutter*, 19 Kan. 83.

Counsel for defendants in error justify the verdict by arguing that the expectancy of deceased was ten and one-half years, and that his gross income would amount to ten and one-half times \$1500 to \$2000, or from \$16,000 to \$21,000. The calculation leaves out all consideration of the probable diminution in the ability of the deceased, by reason of advancing age, to earn by personal exertions. In four years deceased would have reached the usual limit of strenuous life. Granting that he had the income which one witness said he had, is it a reasonable presumption that he would have continued to earn as much in his seventy-sixth year? As before stated, the testimony of the witness who placed these earnings at these figures is a mere conclusion, unsupported by any evidence, and contradicted by all the facts and circumstances in the case. It has been held error to refuse to instruct the jury in similar cases to consider the probable diminution by reason of advancing age in the power and ability to accumulate. (4 Suth. Dam., 3d ed., § 1268; *The Central Railroad and Banking Co. v. Roach*, 64 Ga. 635.)

There is one way to determine approximately what the accumulations of the deceased would probably have amounted to for the period of his expectancy, and that is by reference to what he had already accumulated. We know how long he had lived; we know his expectancy; we know what he had accumulated. The unknown quantity can best be determined by proportion. If in a lifetime of sixty-six years he had gathered together and possessed only the amount of property shown by the testimony, upon what theory can it be claimed that in the period of his expectancy and naturally declining powers he would probably have accumulated \$7000? It must be apparent that the jury in arriving at this verdict went some distance into the realm of imagination, and were not controlled by

the evidence. It has often been said by the courts that in determining the measure of damages in this class of cases much must, of necessity, be left to the discretion of the jury. No fixed and certain rules for the measurement of such damages can be laid down, but the jury must find a substantial basis in the evidence for any allowance they make. They must not guess at it. They must use a reasonable discretion. Damages out of reasonable proportion to the expectation of pecuniary profit to be justly anticipated cannot be upheld. (*A. T. & S. F. Rld. Co. v. Brown, Adm'r*, 26 Kan. 443; *Coal Co. v. Limb*, 47 Kan. 469, 28 Pac. 181; *Walker v. Railway Co.*, 104 Mich. 606, 62 N. W. 1032.) In an action for the benefit of a brother and sister, where the deceased had accumulated nothing, it was held that only nominal damages should be awarded. (*Howard v. Delaware & H. Canal Co.*, 40 Fed. 195, 6 L. R. A. 75.)

It is seriously urged that plaintiffs suffered damages by being deprived of the counsel, advice and fatherly care of their uncle. In cases where the facts warrant a recovery for the loss of a parent's counsel and services it is held that the damages must be limited to such as would be of pecuniary value. (*Demarest v. Little*, 47 N. J. Law, 28; 13 Cyc. 371.) When we consider the ages of these women, from twenty-three to forty, each married, in comfortable circumstances, and living at some distance from the uncle, and the ages of the men, one twenty-one, the other twenty-nine, living with their mother, and the circumstances in which they were at the time of the death of this bachelor uncle, it is obvious that the probability of any of them suffering pecuniary loss by being deprived of the physical care and intellectual and moral training of the deceased is quite far-fetched.

The deceased was sixty-six years old, with but a small amount of property, the net accumulations of almost a lifetime. He was without wife or child, or any person legally dependent upon him. As was said

Daughters of Justice v. Swift.

in *A. T. & S. F. Rld. Co. v. Brown*, Adm'r, 26 Kan. 443, 458, "where one dies without wife or child, with no one legally dependent upon him, and with only remote relatives as his next of kin, there is only a remote probability that his earnings, whatever they may be, would inure to such next of kin."

Taking the view of the testimony most favorable to plaintiffs with reference to his earnings and the casual benefactions he made to them, and conceding that they would have inherited from him whatever accumulations he would have made during the period of his expectancy, if he had lived, we are of the opinion that the amount of the verdict is unwarranted by the evidence and the facts in the case, and that the trial court should have set it aside.

The judgment is reversed, and the cause remanded for a new trial.

All the Justices concurring.

THE SONS AND DAUGHTERS OF JUSTICE V. LAURA E.
SWIFT *et al.*

No. 14,520. (84 Pac. 984.)

SYLLABUS BY THE COURT.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS**—*Proceeding in Error*—*Limitation*. Section 13 of chapter 23 of the Laws of 1898 (Gen. Stat. 1901, § 3580) limits the time within which fraternal beneficiary associations may appeal from a judgment to sixty days after its rendition. The case of *Modern Woodmen v. Heath*, 71 Kan. 148, 79 Pac. 1091, approved and followed.
2. **CONSTITUTIONAL LAW**—"Equal Protection of the Laws." This construction of the statute does not deprive such associations of the "equal protection of the laws," notwithstanding other litigants have one year within which to perfect an appeal.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed March 10, 1906. Dismissed.

73	255
181	664

Daughters of Justice v. Swift.

J. B. Tomlinson, and Farrelly & Evans, for plaintiff in error.

Albert L. Wilson, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: The plaintiff in error is a fraternal beneficiary association chartered under chapter 23 of the Laws of 1898. On November 4, 1904, the defendants in error recovered a judgment against it on a beneficiary certificate issued by it to one Thomas M. Swift. A case-made for a review of the proceedings was properly and timely made, served, settled and signed, and, together with a petition in error, filed in this court May 24, 1905. The defendants in error challenge the jurisdiction of the court to hear and determine the question presented in the record, and move to dismiss the petition in error for the reason that the proceeding in error was not commenced in this court within the time limited by section 13 of chapter 23, Laws of 1898 (Gen. Stat. 1901, § 3580). The title of the act under which plaintiff in error was chartered reads as follows:

“An act providing for the organization and regulation of fraternal beneficiary societies, orders, and associations, and to provide penalties for violation thereof.”

That part of section 13 containing the provision under consideration is as follows:

“Any association authorized to do business under this act refusing or neglecting to make the reports provided for in this act, or which shall exceed its powers, or shall conduct its business fraudulently, or which shall take steps to remove any suit commenced against it in any of the courts in this state to any of the courts of the United States, or which shall fail to pay any judgment rendered against it in any court in this state, unappealed from, within sixty days of the rendition of such judgment, or which shall fail to comply with any of the provisions of this act, shall be excluded from doing business within this state.” (Gen. Stat. 1901, § 3580.)

Daughters of Justice v. Swift.

The application of this section to a similar state of facts was considered by this court in *Modern Woodmen v. Heath*, 71 Kan. 148, 79 Pac. 1091, and the section applied, and the cause dismissed. That decision is attacked on the ground that the section does not limit the time within which a beneficiary insurance company may perfect its proceedings in error, but is only an enumeration of acts for the violation of which proceedings shall be instituted by the proper authorities to oust it from doing business, and that until such proceedings have matured into a final judgment of ouster it may legally proceed with the transaction of its business.

The legislature determines what privileges shall be granted and what duties shall be imposed upon corporations created by it, and so long as these privileges or duties do not impinge upon any principles of the fundamental law the only duty of the court is to interpret and apply them. In the creation of corporations of the class to which the plaintiff in error belongs the legislature, for reasons of its own, deemed it expedient to limit the time within which such corporations should pay or appeal from judgments rendered against them. Under the provisions of the statute, if the judgment be not paid or appealed from within sixty days from its rendition the association confronts two conditions: It is denied the right of appeal from that judgment, and an action of ouster will lie against it. This was the interpretation placed on the provision in *Modern Woodmen v. Heath*, *supra*, and we are satisfied that the statute was properly interpreted.

The plaintiff in error challenges the constitutionality of section 3580 of the General Statutes of 1901, contending that it violates section 1 of the fourteenth amendment to the federal constitution. Under the general provisions of our statute relating to proceedings in error the petition in error may be filed in this court at any time within a year after final judgment.

In the present case, if the plaintiffs had been unsuccessful they could have prosecuted proceedings in error to this court at any time within one year, while under the construction placed upon this section in *Modern Woodmen v. Heath* the plaintiff in error must commence its proceeding in this court within sixty days from final judgment. Therefore it is contended that the plaintiff in error is denied "the equal protection of the laws."

The act under which the plaintiff in error was incorporated was passed for the purpose of chartering, regulating and controlling fraternal beneficiary associations. These organizations conduct a business entirely without capital. In this respect they differ from other business corporations. The usual and ordinary method of collecting judgments against natural persons or other corporations is unavailable against this class of organizations. The beneficiary of its certificate must accept whatever amount the members contribute, not exceeding the face value of a certificate, and neither the beneficiary nor the organization has any legal remedy against a non-paying member. Another difference is that they are exempted from the payment of a license tax by section 3589 of the General Statutes of 1901. In the creation of such corporations it was proper for the legislature to adopt some adequate and effective remedy different from the ordinary remedy for the collection of judgments. Having been created as a distinct class, with privileges, immunities and benefits not enjoyed by others, the legislature could provide special remedies to meet conditions arising out of, and made necessary by, the privileges granted. The contention, therefore, cannot be sustained. The plaintiff in error belongs to a class, and the restrictions of which it complains are imposed alike upon all persons belonging to that class. Mr. Cooley in his *Constitutional Law*, third edition, at page 249, says:

"The guaranty of equal protection is not to be un-

Daughters of Justice v. Swift.

derstood, however, as requiring that every person in the land shall possess precisely the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal, if all persons in the same class are treated alike under like circumstances and conditions both as to privileges conferred and liabilities imposed. The classification must be based upon reasonable grounds; it cannot be a mere arbitrary selection."

Equal protection of the law is secured if the law operates alike on all of the same class, provided the classification is not arbitrary or unreasonable and arises out of the business engaged in or the peculiar manner in which it is conducted, and, as expressed in *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 165, 17 Sup. Ct. 255, 41 L. Ed. 666, is based "on some difference which bears a just and proper relation to the attempted classification."

One important distinction between this fraternal beneficiary association and individuals and other corporations is that its beneficiaries, as judgment creditors, cannot by the ordinary processes of law collect their judgments. They must look for satisfaction to the voluntary contribution of its members. This membership is varying and uncertain, and a great death-rate necessarily increases its liability, while the means of collection correspondingly decrease. This and other distinctions which the legislature has made are sufficient to authorize and uphold the provision of the statute of which complaint is made.

Under the statute of Oklahoma, which is a reenactment of the Kansas statute, it is provided that in an attachment proceeding against a resident the plaintiff is required to execute an attachment bond, but if the defendant is a non-resident a bond is not required. It was held in *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84, 19 Sup. Ct. 346, 43 L. Ed. 623, that the classification into resident and non-resident defendants was justified, and that the provision did not violate the con-

stitutional inhibition. The constitution does not require the same law to be applied to two distinct classes. It "only requires the same means and methods to be applied impartially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." (*Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 6 Sup. Ct. 57, 29 L. Ed. 414.)

The subject of insurance and the creation, regulation and control of insurance corporations are matters over which the states have assumed to exercise a special supervision. This became necessary because of the many abuses arising out of the manner in which these corporations conducted the business; and all legislative enactments having this object in view should be liberally construed by the courts to further this recognized policy. The time allowed fraternal beneficiary associations to prosecute proceedings in error is not so short as to deprive them of the right of appeal, and in view of the supervision justly exercised by the state over insurance companies for the protection of the public from impositions it is a just and reasonable regulation, and does not violate any of the provisions of section 1 of the fourteenth amendment to the constitution of the United States.

The proceeding in error is dismissed.

All the Justices concurring.

CHARLES E. GIBSON V. SOLOMON JOHNSON.

No. 14,521. (84 Pac. 982.)

SYLLABUS BY THE COURT.

TITLE—*Suit to Quiet—Mortgage Barred by Statute of Limitations.* The law does not permit a mortgagor to quiet title against the holder of his mortgage on the naked ground that the right to foreclose the mortgage has become barred by the statute of limitations.

Error from Rawlins district court; ABEL C. T. GEIGER, judge. Opinion filed March 10, 1906. Reversed.

Chambers & Chambers, and *G. Webb Bertram*, for plaintiff in error.

J. P. Noble, for defendant in error.

The opinion of the court was delivered by

BURCH, J.: This proceeding in error arises from a suit to quiet title brought under the provisions of section 594 of the code of civil procedure (Gen. Stat. 1901, § 5081). The answer admitted the allegation of the petition that the defendant claimed an adverse interest in the land, and described such interest as one created by a mortgage given by the plaintiff to secure his unpaid note held by the defendant. Facts alleged in the petition not admitted by the answer were denied, and the prayer was merely that the defendant be allowed to depart from the court without costs being imposed upon him. The reply admitted the execution of the note and mortgage, but asserted that the defendant's right to recover upon them was barred by the statute of limitations. A demurrer to the reply was overruled, and an objection to the introduction of testimony suffered the same fate. Evidence responsive to the plaintiff's pleadings was demurred to without avail. A new trial was refused, and judgment was rendered for the plaintiff quieting his title against the defendant's mortgage, and order-

73	261
80	331

73	261
182	654

ing that instrument canceled of record. The legal propriety of these proceedings depends, of course, upon the use made of the statute of limitations.

Had the plaintiff been obliged to state the facts constituting his cause of action, he must have shown that the defendant was claiming an interest in the premises under a mortgage given by the plaintiff, that more than five years had elapsed since a cause of action accrued to the defendant upon such mortgage, and that no suit had been brought to enforce it—the legal conclusion being that, because it was barred by the statute of limitations and no longer could support an action, the plaintiff's otherwise perfect title ought to be quieted against it. Such a petition would be demurrable because the statute of limitations would constitute an indispensable element of the plaintiff's cause of action. The way to the relief demanded could not be opened except through its aggressive instrumentality, and if relief were granted it would be upon the basis of a purely negative plea, permissible only for the purpose of resistance—protection from disturbance—defense. (*Corlett v. Insurance Co.*, 60 Kan. 134, 55 Pac. 844; *Burditt v. Burditt*, 62 Kan. 576, 64 Pac. 77.)

To avoid a direct assertion of the statute of limitations as a part of his cause of action the plaintiff filed a petition of the blind character which the law allows in this class of cases. He was, however, compelled to allege that the defendant claims an interest in the premises adverse to him, and that such interest is junior and inferior to his own rights. Under such a petition the plaintiff is bound to maintain the alleged superiority of his own title by proof, the question in a suit to quiet title being, Who has the paramount right? (*Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862.) If the proof relied on should consist of facts showing that a mortgage held by the defendant and constituting the basis of his claim is barred by the statute of limitations, relief must be denied the same as if the facts creating the bar had been pleaded in the petition, since

the plaintiff must use it affirmatively and constructively in order to make out his case.

By his answer the defendant did nothing to relieve the plaintiff of his embarrassment. He merely defined the nature and extent of the claim which the petition charged him with making by supplying a brief description of the instruments relating to it. He did this without indicating that any cause of action had ever accrued to him upon such instruments, without averring that they created any lien or are still enforceable, without asking for any affirmative relief in his favor upon them, and without praying that the plaintiff should be defeated on account of them. The answer did nothing more than discover the general character of the defendant's claim, and the plaintiff was still left with the burden upon him of defeating that claim before judgment could go in his favor. He brought the suit for the purpose of determining (bringing to an end) the defendant's adverse interest. He was under the necessity of producing facts sufficient to accomplish that purpose. Those furnished by the reply and by the evidence did nothing more than show that the bar of the statute of limitations might be urged against the defendant if he were the moving party. He was not the moving party, and the demurrers ought to have been sustained.

Section 25 of the code of civil procedure (Gen. Stat. 1901, § 4453) provides that when a right of action is barred by the provisions of any statute of limitations it shall be unavailable either as a cause of action or ground of defense. Broadly speaking, a defense may be any kind of opposition to a plaintiff's claim. In this sense the defendant's special denial constituted his defense. Within the purview of the statute cited a defense is something which, after the plaintiff's right to recover is admitted or proved, the defendant must affirmatively establish, to prevent judgment going against him. It should consist of new matter, and ordinarily should appear in the second subdivision of

Gibson v. Johnson.

the answer, according to the form prescribed by section 94 of the code (Gen. Stat. 1901, § 4528). Whenever new facts are brought upon the record and urged affirmatively against the plaintiff, either as a basis of independent relief or to overthrow the plaintiff's case, so that the position of the parties is reversed and the defendant himself becomes the aggressor, the plaintiff can resist the attack by pleading the bar of the statute of limitations.

In *Donald v. Stybr*, 65 Kan. 578, 70 Pac. 650, the defendant claimed that he had a superior lien which he sought to establish, and in any event claimed that the plaintiff held a title subject to a right of redemption which the defendant demanded an opportunity to exercise. A plea of the statute was allowed. In *Hogaboom v. Flower*, 67 Kan. 41, 72 Pac. 547, a defendant mortgagee undertook to foreclose a mortgage against a plaintiff seeking to quiet his title. He thereby exposed his right to the effective opposition of the statute and a judgment of impotency necessarily followed.

But the law does not permit a mortgagor to quiet title against the holder of his mortgage on the naked ground that the right to foreclose the mortgage has become barred by the statute of limitations.

The judgment of the district court is reversed, and the cause remanded.

All the Justices concurring.

THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY V. M. H. MORRISON.

No. 14,522. (85 Pac. 295.)

SYLLABUS BY THE COURT.

1. *RAILROADS—Frightening Team—Omission to Give a Signal.* Assuming that where a private road crosses a railroad-track by means of a subway the situation is such as to authorize a court to submit to a jury the question whether the railroad company owes to one about to use or actually using such crossing a duty to give warning of the approach of a train, the omission to give such warning cannot be made the basis of a recovery for injuries received in a runaway by one whose horse is frightened by a passing train after he has driven through the subway and is traveling upon a road parallel with the track, although he is but fifty feet from the crossing.
2. ——— *Place of Peculiar Danger—No Duty to Sound a Whistle.* In the case stated in the foregoing paragraph the non-liability of the company is not affected by the further fact that the place where the plaintiff's horse was frightened was rendered one of peculiar danger because the road was there confined in a narrow lane by a barbed-wire fence paralleling the railroad.

Error from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed March 10, 1906. Reversed.

L. F. Parker, and *W. F. Evans*, for plaintiff in error.

T. A. Kramer, for defendant in error.

The opinion of the court was delivered by

MASON, J.: A horse which M. H. Morrison was driving became frightened at a passing train of the St. Louis & San Francisco Railroad Company and ran away. Mr. Morrison was thrown out of his buggy and seriously injured. He sued the railroad company, and recovered a judgment for \$1925, from which the defendant prosecutes error. The only question necessary to be considered is whether there was any evidence tending to show that the injury was the result of the

Railroad Co. v. Morrison.

breach of any duty which the company owed to the plaintiff.

In the vicinity of the place where the injury occurred the railroad-track runs north and south, and crosses a small stream known as the south branch of Hickory creek. Two wagon roads on the east side of the railroad, one coming from the north, the other from the southeast, unite at this point, and, paralleling the bed of the stream, pass under the railroad-track and immediately turn south. These roads are not highways, but they have long been used by the owner of the land, his neighbors and others to such an extent that ruts have been worn, rendering them plainly visible. The railroad-track south of the creek is straight for some sixty or seventy rods, and then turns and is hidden from sight by trees and bluffs. At the creek the wagon roads descend somewhat sharply to pass under the track, and from the low ground the view is cut off within fifty feet or so by the trees and the higher ground. On the west side of the railroad the wagon road runs south through a narrow lane, enclosed between the railroad on the one side and a barbed-wire fence on the other. These conditions have existed for many years.

On the day of the accident the plaintiff had business which rendered it desirable for him to make use of the crossing described. He drove toward it upon the road that comes up from the southeast. As he neared the railroad-track he listened for a train, and looked down the track as far south as it was visible. Not seeing or hearing anything to indicate the approach of a train, he drove under the track and turned south. He had just reached the high ground and entered the lane already described, and was pursuing his course south, being some fifty or sixty feet from the crossing, when a train going north passed him, frightening his horse and occasioning the injuries for which he asked damages. No whistle was blown or bell sounded as the train approached the crossing. The contention of the

Railroad Co. v. Morrison.

plaintiff is that the jury were warranted in concluding that the situation and surroundings of this crossing imposed a duty upon the company to have a signal given whenever a train approached it, and that the omission to give such a signal in this case was an act of negligence toward the plaintiff which caused his injury. The soundness of this contention constitutes the whole subject of inquiry. It is not claimed that any of the train crew knew of the situation of the plaintiff, but that they were chargeable with notice of the existence of the roads and were bound to assume that there might be travelers at the crossing.

It is substantially conceded that the road was not of such a character as to be within the terms of the statute (Gen. Stat. 1901, § 1323) requiring a whistle to be sounded upon the approach of a locomotive to a public crossing. But it is insisted that, inasmuch as this crossing was so situated that one about to use it could not see far enough down the track to give him adequate warning of the coming of a train, the case falls within the rule stated in *Roach v. St. J. & I. Rld. Co.*, 55 Kan. 654, 41 Pac. 964, where it was held that whether it is negligence for an engineer to omit to give a signal near a private crossing is or may be a question for the determination of a jury. Whether this rule should ever be applied to any crossing except where the wagon road and railroad-track are upon the same grade is a question upon which the authorities differ. In Massachusetts it is held that it should not, but in Pennsylvania and Kentucky the decisions are to the contrary. (See *Favor v. Boston & Lowell Railroad Corporation*, 114 Mass. 350, 19 Am. Rep. 364; *Pennsylvania Railroad Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346; *Rupard, &c., v. Chesapeake & Ohio Railroad Company*, 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316.) In Wisconsin and in Georgia it is held that statutes requiring a whistle to be sounded whenever a locomotive approaches a public crossing have no application to any but grade crossings, for the reason that only in

Railroad Co. v. Morrison.

such cases is there any common use of the highway, or possibility of actual collision, although in both states it is recognized that the frightening of horses is one of the dangers intended to be guarded against by such statutes. (See *Jenson v. The Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680; *McElroy v. Ga., C. & N. Railway Co.*, 98 Ga. 257, 25 S. E. 439; *Ransom v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.*, 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718; *Bowen v. Gainesville R. R. Co.*, 95 Ga. 688, 22 S. E. 695. See, also, in this connection, *Skinner v. New York O. & W. R. Co.*, 64 N. Y. Supp. 325.)

Whether the railroad company may be held in any case to owe a duty to one who is using or is about to use a private subway under its track to give timely notice of the approach of a train need not now be determined, as we conclude that however that question might be decided no liability against the defendant is shown in this case, for the reason that at the time of the injury the plaintiff had crossed under the railroad-track and was traveling upon a road parallel to it.

It is true that under statutes requiring signals to be given upon the approach of a train to a public crossing it has been held, although there is some conflict in the decisions, that the railroad company owes the duty to give such warning, not only to persons about to use or actually using the crossing, but also to those traveling upon the highway in the vicinity. But in these cases the liability of the railroad is based upon the very terms of the statute, the theory adopted being that the violation of a positive duty enjoined by the legislature gives a cause of action to any one who suffers injury by reason of such violation and whose protection may reasonably be supposed to have been to any extent within the legislative contemplation. It is not to be inferred from these decisions that in the absence of a statute, or in the case of a private crossing, to which the statute does not apply, the same doctrine

Railroad Co. v. Morrison.

would justify a court or jury in awarding damages to one whose horse was frightened by a train elsewhere than at a crossing.

In the present case any duty that the railroad company may have owed the plaintiff did not arise from the fact that he was using a road which approached near to the track, but from his use of a road which actually crossed it, although at a different grade. It is obvious that where a highway lies near to a railroad there is some danger of accidents resulting from horses being frightened by passing trains, and that this danger would be less if timely notice should be given of their approach. But so far as we are aware it has never been contended on this account that there was an obligation on the part of those operating trains to give any signal upon approaching a place where the highway and railroad-track come close together without crossing. Where the road and track lie parallel for a considerable distance this would be impracticable, as involving a continuous sounding of the whistle or ringing of the bell. This consideration does not constitute the reason for not exacting such a requirement, however. It could indeed have little application where a highway comes up to the railroad and then turns sharply away. In such a situation there might be sufficient reason for giving a signal to justify legislation compelling it, but to demand it in the absence of such an enactment would be to require too close a balancing of probabilities on the part of the employee in charge of the engine. The very sounding of the whistle involves an appreciable addition to the risk of frightening horses. The law reports show that claims against railroad companies for causing runaways by the giving of signals, if not as common as those based upon an omission to give them, are far from infrequent.

It may be that the risk of an injury resulting from the horse of a traveler being frightened by a train while actually using the crossing under the track was

so great that as against that risk a jury might well say that it was incumbent upon the agents of the railroad company to give a signal of the approach of a train. If so the duty resulted from the special danger at that very place, and not from the general danger involved in the proximity of the wagon road to the railroad-track. The plaintiff, not having been injured by the only peril against which it could have been the duty of the trainmen to protect him by the giving of a warning, had no ground of recovery against the company.

In the argument some stress was laid upon the fact that the place where the plaintiff's horse took fright was rendered one of peculiar danger by reason of the road's being confined to such narrow limits by the barbed-wire fence. This was not a condition for which the defendant was in any way responsible. If such a condition existed elsewhere than near the crossing it would not impose a duty to signal upon the approach of a train. It had no necessary connection with the crossing—its existence in proximity thereto was purely incidental. The special and peculiar danger resulting from the placing of a fence outside of the road so near the track was not one of which the railroad company was required to take notice and against which it could be required to guard by the giving of signals with reference thereto.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concurring.

JOHN H. WEST *et al.* v. R. L. COMEAUX.

No. 14,527. (85 Pac. 138.)

SYLLABUS BY THE COURT.

FORCIBLE ENTRY AND DETAINER—*Evidence of Peaceable Entry—Bond for a Deed.* In an action of forcible entry and detainer, where defendant claims that he entered peaceably under a bond for a deed executed by plaintiffs, who were the owners of the premises, and that at the time the bond was executed plaintiffs gave him verbal permission to take possession, it was proper to admit in evidence the bond for a deed for the purpose of showing the character of defendant's entry and possession.

Error from Brown district court; WILLIAM I. STUART, judge. Opinion filed March 10, 1906. Affirmed.

F. M. Pearl, R. F. Buckles, and D. E. Reber, for plaintiffs in error.

John F. Kerrigan, and James Falloon, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: This was an action of forcible entry and detainer. John H. West and D. C. Barnes were the owners of a hotel at Morrill, in Brown county. On March 26, 1903, they executed a bond for a deed to the defendant, by which they agreed to convey the property to him for \$1600, payable in monthly payments. The bond was drawn at the request of both parties by a notary, who took the acknowledgment of the grantors. It was left in their possession, to be held for some purpose—plaintiffs claiming there was no delivery; defendant claiming that it was delivered to him and he consented that they should retain it in their possession. The evidence of the defendant shows that at the time the bond was executed the plaintiffs told him he could take possession of the hotel at any time, the sooner the better. Defendant took possession

between three and five o'clock on the morning of April 6. Plaintiffs claimed that they had reconsidered the matter after signing the bond, and had notified him that he could not have the place. Upon his refusal to vacate, upon the three days' statutory notice, this action was brought. The jury returned a verdict for the defendant, and answered several special questions. Plaintiffs' motion for judgment on these findings was denied, a new trial refused, and they bring the case here for review.

The main contention of the plaintiffs was that the bond for a deed had never been delivered, and that before the defendant made the entry he was notified the trade would not be carried out and that he could not have possession.

The general verdict was against the plaintiffs, and there was abundant evidence to support it. They insist that they were entitled to a judgment on the special findings. This claim is based upon the findings of the jury, in substance, that on March 20 the former tenant surrendered possession of the hotel to the plaintiffs, and that the plaintiffs gave the statutory three days' notice before bringing the action. Counsel then say in their brief:

"It stands out bold and clear all through the findings of the jury and the evidence as quoted herein that the defendant knew and was informed by plaintiffs that they did not intend to place him in possession of the premises and that they did not intend to abide by, or fulfil, the alleged contract for a deed; and notwithstanding this defendant entered the property in question, in the absence of the plaintiffs, and between three and five o'clock in the morning of Monday, April 6, 1903, and that he refused to surrender possession on demand, and that he was still in possession at the time of the trial of this action."

The seventh question was asked and answered as follows:

"Did not D. C. Barnes, one of the plaintiffs herein, tell the defendant, Comeaux, that they were not going

to let him have the property before he entered and took possession? Ans. No."

This is the only finding in reference to this matter, and with the weight of the evidence we have nothing to do in considering a motion for judgment on the special findings. The claim that upon these findings the court should have rendered judgment in favor of the plaintiffs has no merit.

It is urged that the court committed error in admitting the bond for a deed, as the title was not involved. This was an action of forcible entry and detainer, and defendant claimed to have entered lawfully and peaceably by the verbal permission of the owners, who certainly had the right to authorize him to enter. In connection with the alleged verbal permission to enter it was competent to offer in evidence the bond for a deed, as explaining the verbal permission. It was proper for the purpose of showing the character of defendant's entry as well as the character of his detention. (*Conaway v. Gore*, 27 Kan. 122, 126, 127; 13 A. & E. Encycl. of L. 754, 756.)

We have examined the instructions and find no error in them. They correctly state the law of forcible entry and detainer as applied to the facts in evidence. The judgment is affirmed.

All the Justices concurring.

THE ELECTRIC RAILWAY, LIGHT AND ICE COMPANY V.
WILLIAM B. BRICKELL, *as Administrator, etc.*

No. 14,529. (85 Pac. 297.)

SYLLABUS BY THE COURT.

1. **DEMURRER—Evidence—Contributory Negligence.** Where, in an action for damages on account of personal injuries, the defendant demurs to the evidence of the plaintiff on the ground that it appears therefrom that the party injured was guilty of contributory negligence, it will not be deemed erroneous for the court to overrule such demurrer, if the facts justify a contrary conclusion.
2. **EVIDENCE—Admissibility under a General Denial.** Any evidence is admissible under a general denial which controverts the facts denied.
3. **RAILROADS—Injury to Person on the Track—Evidence.** Where a person while sitting on a railroad-track is run over and killed, under circumstances which seem to justify the inference of contributory negligence, and the plaintiff, to rebut such inference, offers evidence to establish that the deceased had been subject to attacks of pleurisy which rendered her temporarily helpless, for the purpose of enabling the jury to infer therefrom that she was helpless when run over, such evidence is not subject to the objection that it bases one presumption upon another.
4. **PRACTICE, DISTRICT COURT—Special Findings by a Jury.** It is not error for a court to refuse to require a jury to make its answers to certain special findings of fact more specific, when such answers, if made as requested, would not differ in legal effect from those already made.
5. ——— **Instructions.** It is not error to refuse to give an instruction to the jury when the instructions given embrace in legal effect all that is in the one refused.

Error from Geary district court; R. L. KING, judge.
Opinion filed March 10, 1906. Affirmed.

Humphrey & Humphrey, for plaintiff in error.

Roark & Roark, Lee Monroe, and E. P. Hotchkiss,
for defendant in error.

Railway Co. v. Brickell.

The opinion of the court was delivered by

GRAVES, J.: On April 3, 1903, Susan Brickell was run over by one of the cars belonging to the plaintiff in error, and killed. The administrator of her estate brought an action in the district court of Geary county to recover damages for her death, and obtained a judgment for \$2000. The defendant seeks to reverse the judgment by proceedings in error in this court.

Several assignments of error are presented, the principal and most important of which is the refusal of the court to sustain a demurrer to the evidence. It is urged that the demurrer should have been sustained for the reason that the evidence showed contributory negligence on the part of the deceased.

In substance, the evidence upon this subject was as follows: The defendant operated an electric railway in Junction City, Kan. The deceased resided on a street along which the railway ran, and was acquainted with the speed and power of the cars operated thereon. She was a poor, hard-working woman. She and her husband were addicted to the use of intoxicating liquor, but she is not shown to have ever been drunk. At the request of her husband she sometimes obtained liquor for him. Upon the evening of the injury she had been out on the street for some time, but it is not shown for what purpose. At the time she was struck by the car she was sitting or crouching on or near one of the rails of the track, at a place where there was a slight down grade. How long she had been there, or why she did not move to avoid the car, are questions not very clearly answered by the evidence. She had a bottle of whisky with her, which was broken at the time of the accident. There was a feeble headlight on the car, and she might have seen it for a long distance before she was struck. The motor-man says she looked up at him about the time she was run over, and had a wild look in her eyes which he could never forget. She suffered from occasional attacks of pleurisy which rendered her

temporarily helpless. It does not appear that she had any disposition to commit suicide; ordinarily she was in good health, and in possession of her faculties. The injury occurred about nine o'clock at night, when her husband was at home asleep. Upon these facts the defendant claims that, although the injury was caused by its negligence, the deceased was guilty of contributory negligence which bars a recovery, and the court erred in submitting that question to the jury.

Did the deceased intend to commit suicide? Was she so drunk as to be unable to realize danger or to roll over and avoid it, or was she helpless on account of an attack of pleurisy? Was the "wild look in her eyes," which will never be forgotten by the motor-man, the look of insanity, or the result of anguish from pain and terror at the terrible death about to take place? There was some evidence tending to answer each of these inquiries in the affirmative. It seems eminently proper, therefore, that these questions should have been submitted to a jury. We are unable to say that the district court erred in overruling the demurrer.

It is further urged by the plaintiff in error that all of the evidence offered to show that the deceased had been subject to attacks of pleurisy, which at times rendered her helpless, was erroneously admitted. It is claimed that it was irrelevant and immaterial under the issues, and an attempt to base one presumption upon another. The defendant pleaded contributory negligence on the part of the deceased, and alleged, in substance, that she intentionally and deliberately placed herself on the track for the purpose of being run over, locating herself in a way to avoid discovery by the motor-man. The plaintiff replied with a general denial. That was the issue. Under a general denial any evidence may be given which controverts the facts denied. (1 Encyc. Pl. & Pr. 817; *Davis v. McCrocklin*, 34 Kan. 218, 8 Pac. 196.) The evidence objected to was intended to show that the deceased was not on the track intentionally, but was there involuntarily and in a helpless condition. This,

Railway Co. v. Brickell.

if true, directly disproved the averments of the answer, and was admissible. We do not think the objection that this evidence had the effect of placing one presumption upon another is well taken.

It was shown that the deceased was on the track when injured, but this fact, unaided by any further fact or inference, proved nothing. She may have been there voluntarily, and remained there through indifference or reckless negligence. She may have been there involuntarily, and against her will. Being there, she may have been unable to move out of the danger, although fully realizing it. What the real fact was in this respect could only be determined by inference from the facts proved. To remove the presumption of negligence produced by inferences drawn from the evidence of the defendant, the plaintiff offered proof that the deceased was subject to attacks of pleurisy which rendered her temporarily helpless. From this fact, when established, the jury were expected to infer that at the time of the injury the deceased was in a helpless condition from one of these attacks. If this fact were proved, and the inference justifiable, then from this evidence the legal deduction would follow that she was not chargeable with contributory negligence. The only presumption or inference in the proposition is based upon an established fact, and not upon another presumption.

It is also claimed that the court erred in refusing to require the jury to make more definite their answers to certain questions submitted to them. The defendant presented thirty-five special questions to the jury, among which, with the answers thereto, were the following:

"(6) Ques. Was there any reason why she could not have got off the track in a second of time? Ans. Yes.

"(7) Q. If you answer the last preceding question 'yes,' state what that reason was. A. She was mentally and physically unable to move."

"(10) Q. Was there anything to prevent the de-

ceased from seeing the car approaching in time to have got off the track? If there was, state fully what. A. Either physical or mental ailment."

The defendant moved the court to require the answers to Nos. 7 and 10 to be made more definite and certain, which request was as follows:

"Said defendant, in the presence of the jury and before they have been discharged from the consideration of this case, moves the court to require the jury to return to the jury-room and to direct the jury to answer questions Nos. 7 and 10 of the questions submitted by defendant more definitely, and so as to show whether it was a mental or physical ailment and disability which affected the deceased; and to show which it was."

If the deceased was helpless at the time of the injury, it is immaterial whether such helplessness was the result of a mental or a physical cause. To have required the jury to specify which cause would have been useless. The result would not have been affected thereby, and, therefore, we cannot say that this refusal of the court was erroneous.

Finally, it is said the court erred in refusing to give an instruction to the jury which reads:

"You are instructed that the burden of the proof is on the defendant to prove the contributory negligence of the deceased, unless you find the evidence of the plaintiff shows such contributory negligence, in which case the burden of showing the same is not on defendant."

The court did give an instruction which reads:

"The court instructs the jury that the burden of proving contributory negligence on the part of the plaintiff is upon the defendant."

It is claimed that the court, by refusing to give the instruction requested, left the jury to be misled by the supposition that the burden of proof, as defined by the court, meant that all the evidence to be considered upon the subject of contributory negligence must have been given by the defendant. If the court had not fully met this complaint in its other instructions there would

Samp v. Braden.

have been considerable force in the contention, but we think the instructions as a whole are unobjectionable. The court presented the question of contributory negligence quite fully and clearly to the jury, and stated repeatedly: "If you find and believe from the evidence" that Susan Brickell, etc. This was equivalent to saying that the jury must "find and believe" from the whole evidence in the case, and not from the evidence of either party.

After a careful examination of all the questions presented we are unable to find any material error. The judgment is affirmed.

All the Justices concurring.

FRED SAMP *et al.* V. S. H. BRADEN, *as Receiver, etc.*

No. 14,531. (85 Pac. 289.)

SYLLABUS BY THE COURT.

JURISDICTION—*Supreme Court—Amount in Controversy.* Where several and distinct judgments, each for less than \$100, are rendered against different defendants upon their individual liabilities as stockholders in a corporation, they cannot by aggregating the judgments and uniting in a proceeding in error give the supreme court jurisdiction, although the judgments were rendered in the same action and involved common questions of law.

Error from Allen district court; TRAVIS MORSE, judge *pro tem.* Opinion filed March 10, 1906. Dismissed.

Chris Ritter, and *W. A. Choguill*, for plaintiffs in error.

McClain & Apt, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: S. H. Braden, as receiver of the Elsmore Creamery Company, brought an action against Fred Samp and Rudolph Kamping to recover upon

Samp v. Braden.

their individual liabilities as stockholders of that company. They contested the action upon various grounds, but the court found in favor of the plaintiff and rendered judgment against Rudolph Kamping for \$100, and another judgment against Fred Samp for \$100. Although the judgments were embraced in a single entry, they were distinct, and were founded upon single shares of stock, each of the face value of \$100. Both defendants joined in this proceeding, asking for a reversal of the judgments, but the right to a review is challenged on the ground that the amount or value in controversy is not sufficient to give the court jurisdiction.

Under the code the appellate jurisdiction of the court cannot be exercised in cases of this character "unless the amount or value in controversy exclusive of costs in civil actions exceeds \$100." (Code, § 542; Gen. Stat. 1901, § 5019.) Neither of the judgments exceeds \$100, and the question arises, Can the defendants by uniting in one proceeding and aggregating their judgments confer jurisdiction upon this court? There was no joint liability of the defendants, nor is there any unity in the judgments. While both are in favor of the same plaintiff, and were rendered in the same action, each is based upon an independent and individual liability, and they stand as distinct and separate as if they had been awarded in different actions against each defendant. Neither defendant is concerned whether the judgment against the other is affirmed or reversed, nor would the compromise or settlement of a judgment by one defendant affect the liability of the other. Either one might settle the judgment against himself without the consent of the other, and if he did so it would be clear that there would be no jurisdiction to review the remaining judgment.

While these judgments grow out of the same corporate transactions, and involve some common questions of law, they are not tied together by any common interest, and they must be separately enforced. As to

Cullison v. Cullison.

each defendant the judgment against him fixes the amount or value in controversy, and, since neither judgment is sufficient in amount to authorize a review, jurisdiction cannot be obtained by the defendants aggregating judgments which are several and distinct. (*Richmond v. Brummie*, 52 Kan. 247, 34 Pac. 783; *Stinson v. Cook*, 53 Kan. 179, 35 Pac. 1118; *McClelland v. Cragun*, 54 Kan. 599, 38 Pac. 776; *Zable, &c., v. Harris*, 82 Ky. 473; *Oswald, &c., v. Morris, &c.*, 92 Ky. 48, 17 S. W. 167; *Henderson v. Wadsworth*, 115 U. S. 264, 6 Sup. Ct. 40, 29 L. Ed. 377; *Hassall v. Wilcox*, 115 U. S. 598, 6 Sup. Ct. 189, 29 L. Ed. 504; *Merritt v. Hozey, late Sheriff, and others*, 4 Rob. [La.] 319; *State National Bank v. Allen*, 39 La. Ann. 806, 2 South. 600; *Sampson's Estate*, 201 Pa. St. 590, 51 Atl. 325; *Davis v. Upham & Stone*, 191 Ill. 372, 61 N. E. 76.) The proceeding in error is dismissed.

All the Justices concurring.

JOSEPH CULLISON V. AMANDA CULLISON.

No. 14,533. (85 Pac. 280.)

SYLLABUS BY THE COURT.

DIVORCE—*Limitation of Action*. The general statutes of limitation of this state have no application to suits for divorce.

Error from Stafford district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed March 10, 1906. Reversed.

Israel Moore & Co., for plaintiff in error.

Paul R. Nagle, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: The plaintiff in error brought a suit for divorce, alleging extreme cruelty. When he had introduced his evidence the court sustained a demurrer

thereto, on the ground that his cause of action was barred by the statute of limitations. It is agreed that the alleged cruelty and the separation occurred March 12, 1897, and the petition for divorce was filed August 6, 1904.

The attorneys are to be complimented for the brevity of the record. The case-made, the certificate of the judge thereto, and the filing of the clerk, together with the entry of appearance herein, cover less than one page, and present clearly all the questions in the case.

The law of divorce has been treated in this state as a separate subject, and article 28 of chapter 80 of the General Statutes of 1901 enumerates the causes for which divorces may be granted and the procedure therein. With the exception of the manner of obtaining service of summons, no reference is made directly or impliedly to other provisions of the code. The article contains no limitation upon the time within which the suit may be commenced. The general statutes of limitation either specifically name the different causes of action to which the limitations apply, or define the nature of such causes so that the different limitations and the causes to which they apply are easily understood. In these statutes none of the causes for divorce is specifically named, nor can any of such causes be classified with those which are defined in the general statutes.

Some states have fixed the time within which a suit for divorce may be commenced after an offense. With few exceptions, these statutes are generally applied to adultery. Independently of the statute, long delay in commencing the suit has frequently been taken into account in determining the sincerity of the party; but it has always been held a subject of explanation, and has never been held to be a bar. (2 Bish., Mar. Div. & Sep. §§ 410-437.)

The judgment is reversed.

All the Justices concurring.

J. F. WAGNER V. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

No. 14,534. (85 Pac. 299.)

SYLLABUS BY THE COURT.

1. PRACTICE, SUPREME COURT—*Review of Judgment on Pleadings and Opening Statement.* It is not necessary to file a motion for a new trial before bringing to this court for review a decision granting a motion for judgment upon the pleadings and the opening statement of counsel and sustaining an objection to the introduction of any evidence in the case.
2. ——— *Cases Disapproved.* The case of *Gruble v. Ryus*, 23 Kan. 195, and other cases holding that a motion for a new trial is a prerequisite to a review of a decision sustaining a demurrer to evidence disapproved.

Error from Kingman district court; PRESTON B. GILLET, judge. Opinion filed March 10, 1906. Dismissed.

C. W. Fairchild, for plaintiff in error.

William R. Smith, O. J. Wood, and Alfred A. Scott, for defendant in error.

The opinion of the court was delivered by

BURCH, J.: The defendant in error moves to dismiss this proceeding for want of a lawful case-made. When the cause came on for trial in the district court a jury were impaneled and sworn, and the plaintiff made a statement of his case and of the evidence by which he expected to sustain it. The defendant moved for judgment in its favor upon the pleadings and the plaintiff's statement. The plaintiff then asked and obtained leave to amend his reply. The amendment having been made, the defendant renewed its motion for judgment, and objected to the introduction of any testimony in the case. The motion and objection were both sustained, and judgment was rendered against the plaintiff for costs. On the same day a motion for a new trial was filed, which was denied some thirty days later.

73	283
774	780
73	283
h76	894
h76	896
76	903
77	762
77	850

When the motion for a new trial was disposed of an order was made extending the time for making and serving a case-made. If no motion for a new trial was necessary the filing of such a motion did not enlarge the time within which an extension could be granted, and jurisdiction to make the order referred to was lost. (*Atkins v. Nordyke*, 60 Kan. 354, 56 Pac. 533.) Section 306 of the code of civil procedure (Gen. Stat. 1901, § 4754) contains the following provisions:

“A new trial is a reexamination in the same court, of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party.”

From this language it is plain that a motion for a new trial has no function to perform unless an issue of fact has been fully determined and the determination has been embodied in one of three specified forms. Not only must there have been a trial, a judicial examination of the issues of fact, but those issues must have been definitely settled by the verdict of a jury or its equivalent, final and conclusive upon the facts unless vacated. Until that stage of the proceedings in an action has been reached the condition precedent to the filing of a motion for a new trial does not arise; the single circumstance capable of creating a field for its operation has not occurred; the only subject-matter vulnerable to its attack does not exist.

There is no such thing as a new trial of issues of law. Questions relating to the determination of those issues may be investigated by this court without previous re-examination by the trial court. Whenever there has been a trial and a verdict or report or decision on the facts, only those errors of law occurring at the trial which inhere in and vitiate the conclusion of fact need be called to the attention of the trial court by a motion for a new trial. If the facts have been agreed to, or

Wagner v. Railway Co.

if issues upon the facts have been eliminated, or if, for any reason, the controversy so shape itself that its determination depends upon a question of law, and the normal end of a trial of an issue of fact—a verdict, if tried by a jury, a report, if tried by a referee, a decision, if tried by the court—is not reached, there is no occasion to use a motion for a new trial. If it be claimed that error of law has been committed so that the proceeding has fallen short of a verdict, report or decision upon the facts, the aggrieved party may ask this court to secure to him, not a new trial, but a trial in the complete sense of the term; not a reexamination of the issues of fact, but an initial examination of the issues of fact, which shall be continued until it reach the point of actual consummation for such proceedings. There must always be a “former” verdict, report or decision determinative of issues of fact to be vacated before there can be a new trial, or any necessity for a motion for a new trial.

When judgment is rendered on the pleadings there can be no trial of the issues of fact, no verdict, and no motion for a new trial is required. (*Land Co. v. Muret*, 57 Kan. 192, 45 Pac. 589.) When an objection to the introduction of evidence under the pleadings is sustained there can be no investigation, much less determination, of the issues of fact, and a motion for a new trial is not necessary. (*Water-supply Co. v. Dodge City*, 55 Kan. 60, 39 Pac. 219.) If in stating his case to the jury a party assert or admit some fact which leads his opponent to move at once for judgment or to object to the introduction of evidence, the question for determination is one of law precisely the same as if the fact had been pleaded. The purpose of the motion is to obviate calling the witnesses and proceeding with the examination of the issues of fact, if any remain, and if the motion be allowed there can be no verdict or decision on the issues of fact. Therefore no motion for a new trial is needed in such cases, and

—

the party aggrieved may proceed at once to take the preliminary steps essential to a review of the decision by this court. (*Ritchie v. K. N. & D. Rly. Co.*, 55 Kan. 36, 48-50, 39 Pac. 718.)

It must be conceded that the cases of *Gruble v. Ryus*, 23 Kan. 195, *Norris v. Evans*, 39 Kan. 668, 18 Pac. 818, *Lott v. K. C. Ft. S. & G. Rld. Co.*, 42 Kan. 293, 21 Pac. 1070, and others, holding that if a demurrer to evidence be sustained a motion for a new trial is necessary to sustain a proceeding in error here, are opposed in principle to this decision. The opinion in *Gruble v. Ryus*, *supra*, takes into consideration nothing except the fact that error of law occurring at the trial is ground for a new trial. It entirely overlooks the provision of the statute deferring a motion for a new trial in all cases until after a verdict, or its equivalent, has been returned. A demurrer to evidence raises nothing but a question of law, and it is impossible for its decision to be a decision of the issues of fact. If sustained, it not only leaves the issues of fact undetermined, but it deprives the party against whose evidence it is directed of any opportunity of having them determined by a verdict, report or decision; and it is only "after" a verdict, report or decision which, unless vacated, settles all controversy with reference to the issues of fact that a motion for the reexamination and settlement anew of those issues is in order. The suggestion in *Gruble v. Ryus* that an improper exclusion of evidence may have induced the ruling sustaining the demurrer to the evidence does not change the procedure which the statute plainly establishes. Both errors may be presented to this court without a preliminary motion for a new trial in the district court, because the abortive trial did not progress to a verdict, report or decision on the issues of fact.

The cases which follow *Gruble v. Ryus* as an authority do not discuss the question involved. Although

Crane v. Bank.

they cannot be overruled in this proceeding, they appear to be contrary to the spirit of the statute and are incompatible with the present views of the court. The motion to dismiss is allowed.

All the Justices concurring.

**F. E. CRANE V. THE RENVILLE STATE BANK, OF
RENVILLE, MINNESOTA.**

No. 14,585. (85 Pac. 285.)

SYLLABUS BY THE COURT.

GUARANTY—Tender of Payment by Guarantor—Release. An offer by a guarantor to pay an overdue note if the holder wishes him to do so, accompanied by a display of a sufficient amount of money for the purpose, does not necessarily amount to such a tender of payment as will release him from liability, although the creditor says that he prefers the note to the cash, the transaction being prevented from having that effect by the fact that the offer is made contingent upon the creditor's desiring him to make the payment.

Error from Franklin district court; CHARLES A. SMART, judge. Opinion filed March 10, 1906. Affirmed.

Deford & Deford, for plaintiff in error.

Pleasant & Pleasant, for defendant in error.

The opinion of the court was delivered by

MASON, J.: F. E. Crane sold to the Renville State Bank, of Renville, Minn., a number of notes, including two executed by John Ourada, for \$125 and \$75, respectively, giving a written guaranty of their payment. The notes against Ourada proved uncollectable and the bank sued Crane upon his guaranty, recovering a judgment, from which he prosecutes error. The court found that upon the failure of Ourada to pay the notes at maturity the bank wrote Crane stating that fact

Crane v. Bank.

and asking instructions, and that Crane answered directing that they be placed in judgment.

Complaint is made that these findings are not supported by any evidence. There was testimony that the bank wrote and mailed to Crane a letter of the substance indicated. Crane testified that he had no recollection of receiving it. Nearly two months after its date he wrote to the bank saying: "Put that note into judgment. I have been away from home and that is the reason you have not heard from me." The whole question, so far as this assignment of error is concerned, is whether the court was justified in regarding Crane's letter as an answer to that of the bank. The circumstance that it used the phrase "that note" instead of "those notes" is of but little force, and certainly is not conclusive against the theory that the subject-matter of the communication was the Ourada indebtedness. We think the view of the court has abundant support.

The substantial defense interposed by Crane is based upon the contention that in virtue of a conversation between himself and a representative of the bank he was relieved of all liability and the bank elected to look exclusively to Ourada for the collection of the notes. This conversation took place upon the occasion of the bank's paying some \$800 to Crane in another matter, and was, in full, as follows:

Crane: "Tim, how about the last bunch of paper I sold you; have you looked it up?"

Banker: "Yes, I have; it is first class; it is all first class except that fellow over here, Ourada. He has 640 acres of land, but he is trying to get behind his wife on that proposition; but he can't do that with me. . . ."

Crane: "Now, on that other contract of ours, Tim, I will take that paper up and pay you the money, if you want it, because I am here, and it will cost me only two or three days' time to go over there and get the matter fixed up while I am here, and I don't want to be annoyed with it after I am gone."

Crane v. Bank.

Banker: "No, I would rather have the note than have the money."

Crane: "Well, we have the money right here now on the table; take out the amount if you would rather have the money than the notes, because I don't want to be annoyed with it after I get away from here."

Banker: "No; I will make him pay it; . . . [Ourada] can't get behind that paper, because I will follow him to the end of the earth. I would rather have the note than have the money. . . . I will make him pay it; he can't get behind his wife, with 640 acres of land; I would rather have the note than the money."

It is claimed that this transaction amounted to a perfect tender of payment by the guarantor, and its refusal by the creditor, and that therefore Crane stood from that moment discharged of all liability. An argument is made against this contention based upon the fact that at this time only one of the notes was due. It is argued that no tender could be made upon the note which had not matured, although it drew interest only after maturity, and that an effective tender as to the past-due note could only be made by a separate offer to pay that one alone. Without attempting to pass upon the force of this suggestion, we shall assume that, irrespective of the maturity of the paper, Crane was privileged to take it up at any time.

The question to be determined, then, is whether the conversation already detailed amounted to a tender. We do not think it necessarily had that effect. It certainly came very near doing so, but fell just short of accomplishment. The gap was not wide, but it was sufficient to defeat that result. "A tender is an offer by a debtor, or other person who is under an obligation, to pay such debt or perform such obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same." (28 A. & E. Encycl. of L. 4.) Here there was no definite offer to pay on the one hand and refusal to accept on the other. The obligor indicated his readiness to pay if the obligee desired it—not

Crane v. Bank.

otherwise. The obligee did not really refuse to accept payment. He merely indicated that he was indifferent. For some reason sufficient to himself he even appeared to prefer the note to the money, but he did not say that he preferred the note without Crane's guaranty back of it to the money, and he did not actually refuse to accept payment then and there. At this stage of the proceedings the only controversy between the parties appears to have been which could show the other the greater courtesy in the matter, each seeming to defer to the other's wishes. The offer made by Crane did not purport to be for his own protection, although that feature of the matter was incidentally alluded to. It professed to be for the accommodation of the bank, and its acceptance was in express terms left to the bank's option. There was no such explicit demand that the bank should either accept the money or definitely release Crane from further obligation as the banker had a right to expect if that was what was in the mind of the guarantor. The case is in some respects similar to *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606. The first paragraph of the syllabus in that case reads:

"An offer upon the part of a principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, do not discharge a surety."

In the opinion it was said:

"It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid." (Page 235.)

Where a principal offers to pay a debt and payment is not made by reason of the conduct of the creditor there is good ground for holding that the surety should be deemed discharged, upon the theory that the non-payment results from a failure of the creditor to use due diligence to make collection from the principal and thereby protect the surety. But where, as in the pres-

Deming v. Wallace.

ent case, the offer to pay is made by the surety, there is no room for the application of this doctrine. It is true that a surety may be released by the refusal to accept payment from him when he makes a good tender, but this is for an entirely different reason, namely, because such refusal interposes an insurmountable obstacle in the way of his pursuit of his remedy against his principal. (*Hayes v. Josephi*, 26 Cal. 535; *O'Connor v. Braly*, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155.) In the one case the release of the surety may be accomplished by the creditor's mere neglect to take advantage of a chance to take the money when he can get it, but in the other it can result only from his positive refusal to accept it when the surety makes tender and demands such acceptance as a right. Here the bank missed no opportunity for getting the money from Ourada, and it placed no insurmountable obstacle in the way of Crane's attempting to force the collection himself.

The court was warranted in holding Crane liable for the expenses of the proceedings against Ourada, as well as for the amount of the debt, by the consideration that they were taken by his direction. The judgment is affirmed.

All the Justices concurring.

THE DEMING INVESTMENT COMPANY V. B. F.
WALLACE *et al.*

No. 14,536. (85 Pac. 139.)

SYLLABUS BY THE COURT.

1. **EVIDENCE—*Fraud—Parol Testimony.*** Parol testimony is competent for the purpose of proving fraud and misrepresentation in procuring the execution of a promissory note, where fraud is pleaded as a defense.
2. ——— ***Negotiable Instruments—Consideration.*** Between the original parties to a bill or note the consideration may always be inquired into.

73	291
75	304
75	746
73	291
776	149
73	291
780	24
480	320

Deming v. Wallace.

Error from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed March 10, 1906. Affirmed.

E. P. Hotchkiss, for plaintiff in error.

D. L. Palmer, J. C. Postlethwaite, and Robert C. Postlethwaite, for defendants in error.

The opinion of the court was delivered by

PORTER, J.: Plaintiff in error brought this suit to foreclose a mortgage securing two notes, each for \$500. Defendants claimed that the indebtedness amounted to only \$500, and that the second note was without consideration. The case was tried by the court without a jury, and, from a judgment in favor of defendants as to the second note, plaintiff brings this proceeding in error.

Plaintiff negotiated a loan of \$10,000 for ten years on defendants' farm, and claimed that these notes were given as a commission of one per cent. that had been agreed upon. Defendants claimed that the commission agreed upon was one-half of one per cent., or \$500, and that they were induced to sign the two notes by false and fraudulent representations of plaintiff's agents. It appears from the evidence that three sets of papers were made out and executed, the first and second being destroyed on account of errors. Defendant B. F. Wallace testified that the agents of plaintiff came to his farm during harvest, when he was busily engaged with a number of men in his field, and informed him that it was necessary to execute new papers which they had prepared; that the notary they had brought with them was sick at his house, and they urged him to attend to the matter at once; that he quit work and went to the house, where he and his wife signed the papers, including these commission notes, without examination, relying upon the representations of the agents that the papers were all exactly the same as the ones previously executed, and believing that these notes were each for \$250, which he claims was the amount of the former

commission notes. It was stated in the answer that defendants signed the notes upon the representations of the agents of plaintiff that the notes were exactly alike the former notes in amounts; that these representations were false and fraudulent, and were made for the purpose of inducing defendants to sign them; and that the representations were relied upon by defendants as true.

The first complaint is that there was error in the admission of parol testimony to contradict the terms of a written contract. In the cases cited by plaintiff in error from this court it was expressly stated that no fraud or misrepresentation was relied upon. It is always competent to show by parol evidence that a contract was obtained by fraud, where fraud or misrepresentation is pleaded as a defense. The rule that oral representations and inducements preceding or contemporaneous with the agreement are merged in the writing is subject to the exception that if the representations amount to fraud which avoids the written contract they are not merged therein, and parol evidence is admissible to show the fraud. (*Brook v. Teague*, 52 Kan. 119, 123, 34 Pac. 347; *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. 767; Greenl. Ev., 16th ed., § 284; Browne, Parol Ev. § 79.) In *Brook v. Teague*, *supra*, it was said: "Parol evidence is admissible as between the original parties to a negotiable note to show fraud, and so as to third parties with notice or without having paid value." Between the original parties to a note or bill the consideration may always be inquired into. (*Blood v. Northup and Chick*, 1 Kan. 28; *Miller v. Brumbaugh*, 7 Kan. 343; *Dodge v. Oatis*, 27 Kan. 762; 4 A. & E. Encycl. of L. 196.) There was no error, therefore, in admitting parol testimony to show the actual consideration and for the purpose of proving the alleged misrepresentation and fraud.

It is argued that as defendants were able to read it was negligence for them to sign a note without knowing its contents, and that by their negligence they are es-

Deming v. Wallace.

topped. The case of *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 258, 1 South. 212, is in point. The court there said:

“Where a person signs an instrument without reading it, or if he cannot read, without asking to have it read to him, the legal effect of the signature cannot be avoided by showing his ignorance of its contents, in the absence of some fraud, deceit, or misrepresentation having been practiced upon him. But the rule is otherwise, and the instrument will be held void, where its execution is obtained by a misrepresentation of its contents—the party signing a paper which he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper, for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing.” (See, also, *Buchanan v. Gibbs*, 26 Kan. 277.)

The only other errors complained of relate to the admission of certain testimony which it is claimed was not relevant. A wider range with reference to testimony is permissible where a case is tried by the court; and the testimony with reference to the customary rate of interest at the time of the transaction could not have prejudiced plaintiff.

While there was a sharp conflict in the testimony as to the facts upon which the fraud and misrepresentations were predicated, there was sufficient evidence to sustain the finding of the court that the second note was without consideration. The court, having heard and seen the witnesses, was better able than we are to determine the question of fraud; and, having upon sufficient evidence decided that question, it is not before us. The judgment is affirmed.

All the Justices concurring.

THE MISSOURI PACIFIC RAILWAY COMPANY V. THE
PERU-VAN ZANDT IMPLEMENT COMPANY.

No. 14,537. (85 Pac. 408.)

SYLLABUS BY THE COURT.

73 295
73 303

1. **RAILROADS—Conversion of Goods Consigned to Commission Agent—Action by Consignee.** When property has been consigned by the general owner to an agent who has a special interest therein as factor or commission agent, and the goods so consigned are negligently delayed in transit and converted by the carrier, so that sales thereof previously made by the consignee are canceled and lost, such consignee may maintain an action in its own name against the carrier for the recovery of damages on account of such lost commission, and also for the value of the property converted.
2. ——— **Negligent Delay in Delivery—Damages in Excess of Freight—Consignee's Rights.** When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion.
3. ——— **Presumption as to Knowledge of the Effect of Non-delivery.** Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seed-time and harvest, and the general customs relating thereto in the territory where they do business. A common carrier that, on June 12, 1903, received at the factory in Port Huron, Mich., thrashing-machines consigned to an implement dealer of Hutchinson, Kan., to be delivered at Larned, Kan., with stop-over to unload some of the consignment at Seward, Kan., will be deemed to have had notice that such machines were for immediate sale, if not already sold, and that a delay of delivery until the entire thrashing season passed would defeat the purpose of the shipment.
4. ——— **Conversion—Measure of Damages.** An action was brought against a common carrier by the consignee of thrashing-machines. At the trial it appeared that the plaintiff had sold the machines as agent for the consignor, and was entitled to receive out of the proceeds of the sale a commission of forty per cent. of the price for which the sale was made. It also

Railway Co. v. Implement Co.

appeared that the carrier negligently delayed the delivery of the goods until the sales were, for that reason, canceled, and the commission thereby lost. It further appeared that the carrier converted the machinery to its own use. The action was brought to recover for the loss of commission and the value of the property converted. *Held*, that the price for which the sale had been made was the proper measure of damages in such action.

Error from Reno district court; **PETER J. GALLE**, judge. First opinion filed March 10, 1906. **Affirmed**. Rehearing granted April 6, 1906. Second opinion filed October 6, 1906. Reaffirmed.

STATEMENT.

THE Port Huron Engine and Thrasher Company, of Port Huron, Mich., manufactures thrashing-machines and sells them throughout the country through local agents. Its agent at Hutchinson, Kan., is the Peru-Van Zandt Implement Company (defendant in error). By the contract of agency it is the duty of the Peru-Van Zandt company to advertise, introduce and sell the machines to those desiring to purchase, and when a sale is made an order is taken from the purchaser, in writing, directing the Port Huron company to ship the machinery desired, stating price, manner of payment, and other particulars constituting the conditions of sale, which order is signed by the purchaser and delivered to the local agent. This order is forwarded to the Port Huron company by the agent making the sale. Upon this order the machinery is shipped by the designated route, consigned to the local agent. It is the duty of the agent to receive the machinery and hold possession thereof until payment is made or secured as stipulated in the order of the buyer. In completing the sale the agent takes in payment cash, notes, mortgages, or other security, as directed, but delivers the machinery only after the sale has been approved by the Port Huron company. Until such approval and de-

livery the title to the machinery does not pass from the seller.

The Peru-Van Zandt company receives for its services in making such sales a commission of forty per cent. of the selling price. If any machinery is taken back, or returned, the local agent takes charge thereof, and may resell it and receive a commission therefor.

The local agent pays all expenses incident to the sales made. The buyer pays the freight, in addition to the price stipulated for the machinery. Where payment is made by the purchaser with notes, collection is made by the agents; and out of the proceeds the commission is deducted. The commission always comes out of the proceeds of each sale when collected. The Peru-Van Zandt company under this employment sold two machines for the aggregate sum of \$920, and took from the purchasers written orders therefor, which were duly forwarded to the Port Huron company. Upon receipt of the orders the machines were shipped over the road of the plaintiff in error, consigned to the Peru-Van Zandt Implement Company, at Larned, Kan., with stop-over to unload one of them at Seward, Kan., being the points where the purchasers lived. The bill of lading contained nothing to indicate the relation existing between the consignor (the Port Huron company) and the consignee; whether that of vendor and vendee, or principal and agent.

The machines were shipped June 12, 1903, and in ordinary course would have arrived at their destination within ten days, but on account of negligent delays they did not arrive until some time in the month of August, long after the thrashing season had closed and the sale contracts had for that reason been canceled. By the contract of shipment the freight was payable before delivery of the machinery to the consignee. The consignee declined to pay the freight, claiming that the damages suffered on account of delay far exceeded the amount of the freight bill. The carrier refused to deliver the goods until the freight

Railway Co. v. Implement Co.

was paid. Thereupon the defendant in error demanded that the machinery be delivered to it without payment of freight, and upon refusal commenced this action. The demand was made in the name of the Port Huron company, by the Peru-Van Zandt company, as agent. The petition alleged that the plaintiff was the agent and factor of the Port Huron company, and averred the facts constituting their relationship substantially as hereinbefore set forth. In the first cause of action the plaintiff asked judgment for the amount of commission lost by it, and in the second cause of action demanded judgment for the value of the machines. The carrier retained, and still keeps, possession of the machines. The plaintiff recovered judgment for the price for which the machines were sold. The defendant brings the case here for review.

J. H. Richards, and C. E. Benton, for plaintiff in error; Prigg & Williams, of counsel.

George A. Vandever, and F. L. Martin, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: Many assignments of error have been presented, but they are all substantially covered by these three: (1) It is insisted that the plaintiff has no interest in the machinery in controversy, and, therefore, cannot maintain an action for its conversion; (2) that the proper measure of damages in case of a recovery is the difference between the market value of the machinery at the time and place of delivery and the market value thereof when it in fact arrived at such place; (3) that damages for loss of commission cannot be recovered, because a sale of the property was not within the contemplation of the parties when the shipment was made.

Concerning the first proposition, there is considerable confusion among the authorities as to whether

Railway Co. v. Implement Co.

the consignee or consignor is the proper party plaintiff in an action against a carrier, but the rule that an action for the conversion of goods must be brought by the owner or one having a beneficial interest in the property converted seems to be fairly well established. (Hutch. Carr., 2d ed., §§ 731-734; 6 Cyc. 510; Wood's Browne, Carr. § 599.) The consignee is always presumed to possess the necessary ownership, until the contrary is shown. (Ray, Carr. of Freight, 1006; *Griffith v. Ingledew*, 6 S. & R. [Pa.] 429, 9 Am. Dec. 444; *Smith v. Lewis*, 3 B. Mon. [Ky.] 229; *Arbuckle v. Thompson*, 37 Pa. St. 170; *The Pennsylvania Company v. Poor*, 103 Ind. 553, 3 N. E. 253.) The ownership need not be extensive, and an agent, factor, broker, bailee or other person having rights in the property to be protected may maintain an action, and recover both for himself and the general owner. (*Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Harrington v. King*, 121 Mass. 269; *Finn v. Western Railroad Corporation*, 112 Mass. 524, 17 Am. Rep. 128; *Green v. Clarke*, 12 N. Y. 343; *Bost. and Me. R. R. Co. v. Warrior Mower Co.*, 76 Me. 251.) We think the plaintiff in this case had sufficient interest in the property to enable it to maintain this action. In the case of *Bost. and Me. R. R. Co. v. Warrior Mower Co.*, *supra*, a case very similar to this, the court said:

"Ordinarily when a plaintiff sustains his action it is presumed that the whole amount of damages recovered will belong to him. In fact, the injury to him or to his property is the measure of the damages. But while this is the general rule there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject-matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly,

but may in the name of either. In the action now in question the subject-matter was mowing-machines and parts of mowing-machines. The damage claimed rests upon a neglect of the carrier by which the property was improperly delayed in its transit. The facts show that the title to the property was in the mower company; that it had consigned and forwarded the machines to Dunham by virtue of a contract under which Dunham was to sell them for a specified commission and account to the company for them at a specified price. Dunham was also to pay the freight. This contract, while it did not change the title in the machines and pieces, gave Dunham such a special property in them as to enable him to maintain the action in his own name, and the consignment and forwarding [of] the property, thus setting it apart and putting it into the hands of the carrier for his benefit, gave him a constructive possession sufficient for that purpose; and as the injury was the result of a single wrongful act to the whole property the damage could not be apportioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner. . . . Hence Dunham, in his suit, is entitled to recover not only his own damages but such as have accrued to the mower company as general owners. The measure of damages as held by the court in that case can be applicable upon no other theory. If, then, Dunham should receive the whole damage recoverable in his suit, he would be entitled to retain his own share, and the balance he would hold as trustee for the mower company." (Pages 259, 260.)

In the case of *Southern Express Company v. Armstead*, 50 Ala. 350, it was said:

"The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession." (Page 352.)

A judgment in favor of the plaintiff can work no

Railway Co. v. Implement Co.

harm, as it would be a bar to an action for the same injury by the Port Huron company. (*White et al. v. Bascom et al.*, 28 Vt. 268; *Green v. Clarke*, 12 N. Y. 343; *Harker, et al., v. Dement*, 9 Gill [Md.] 7, 52 Am. Dec. 670; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671.) The plaintiff holds in trust for the Port Huron company whatever remains of the amount recovered, after payment of its commission. (*Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Finn v. Western Railroad Corporation*, 112 Mass. 524, 17 Am. Rep. 128; *White et al. v. Bascom et al.*, *supra*; *Little v. Fossett*, *supra*.)

A consignee has the right to withhold a freight bill, when its damages exceed that amount, and in such a case the refusal of the carrier to deliver the goods until the freight is paid amounts to a conversion. (5 A. & E. Encycl. of L. 232; *Miami Company v. Railway Company*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, 55 Am. & Eng. Rld. Cas. 688; 6 Cyc. 497; *Railway Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066.) The measure of damages is compensation for the injury sustained. An amount which will place the injured party in the same condition he would have occupied if no loss had occurred will satisfy this requirement. If in this case the machinery had been delivered according to contract, the price for which it had been sold would have been realized. Out of this amount the commission due the plaintiff would have been deducted. The freight would have been paid by the purchasers of the machinery. The selling price at the place of delivery seems, therefore, to be the true measure of damages. We think the amount recovered in the district court fairly compensates all parties for the losses sustained. Out of this amount the plaintiff will retain a sum equal to the commission lost, and must account to the Port Huron company for the remainder.

Finally, it is insisted that a sale of the machinery was not within the contemplation of the parties at the time of shipment, and, therefore, the commission is

Railway Co. v. Implement Co.

not a proper element of damages. A railroad company must be held to know facts familiar to ordinary people. It is fair to assume that a carrier of thrashing-machines knows what they are used for, and that the only purpose implement dealers have in shipping such property into the heart of a great wheat country is to sell it. When a shipment of thrashing-machines is made in June of any year, the inference follows that, if they are not already sold, an immediate sale is intended. We think, therefore, that the loss of a commission is not so remote as to be excluded as an element of damages in this case.

The general rule that damages caused by the loss of a sale not within the contemplation of the parties cannot be recovered has no application to the facts here shown. No error appearing, the judgment of the district court is affirmed.

All the Justices concurring.

OPINION ON REHEARING.

(87 Pac. 80.)

SYLLABUS BY THE COURT.

RAILROADS—*Injury to Goods in Transit—Carrier's Lien—Conversion.* Where a common carrier becomes liable to the consignee of goods for injury to property while in transit, and the amount of the damages occasioned by such injury equals or exceeds the freight bill on the damaged goods, the lien of the carrier is thereby extinguished, and the consignee is entitled to the possession of such goods without payment of freight; and in such a case the refusal of the carrier to deliver the goods to the consignee upon demand constitutes a conversion.

The opinion of the court was delivered by

GRAVES, J.: This case was decided at the March, 1906, sitting of this court. A rehearing was granted upon the proposition of law stated in the second paragraph of the syllabus, which reads:

"When a common carrier negligently delays the de-

Railway Co. v. Implement Co.

livery of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion." (Ante, p. 295.)

The plaintiff in error urgently objects to this statement of the law, and insists that it is opposed to both reason and authority. This particular point received very little attention at the first argument of the case, and very few cases directly in point have since been cited by either party. Under some of the older cases, especially in England, the consignee was required first to pay the freight and bring an action for damages afterward. This rule obtained because of the law then existing concerning the forms of action in which a set-off for unliquidated damages might be litigated. Under the modern procedure of this country, however, and especially in this state, where the policy is to litigate every controversy between the parties in the same suit, and thereby avoid circuitry and multiplicity of actions, this class of cases cannot be controlling. (See 25 A. & E. Encycl. of L. 484, subject of "Set-off, Recoupment, and Counter-claim.")

Apparently the plaintiff in error relies upon the case of *Miami Company v. Railway Company*, 38 S. C. 78, 16 S. E. 339, which may also be found in 55 Am. & Eng. Rld. Cas. 688 and 21 L. R. A. 123, and the cases therein cited. This case was cited in the former opinion in support of the proposition in question. The citation was made upon the assumption that the syllabus of the case stated the law as given in the opinion, but on further examination they do not seem to be alike. We have since carefully examined that case, and find that the only question really decided by it is that the evidence in the case did not justify the instructions given.

The trial court in that case adopted the law as

Railway Co. v. Implement Co.

stated by this court, and to which the plaintiff in error objects. In doing so it followed *Ewarts v. Kerr*, 1 Rice (S. C.) 203, which had been affirmed in 2 McMull. (S. C.) 141. Neither of these cases has been modified or reversed, but so far as we have been able to ascertain they still stand as the law of South Carolina. The supreme court did not reverse the trial court because the law given was erroneous, but for the reason that, if correct, it did not apply to the facts of that case, as the evidence did not show whether the damages claimed equaled or exceeded the freight bill. The court made the suggestion, apparently for the future guidance of the trial court, that the rule of law stated in the cases of *Shaw & Austin v. S. C. Railroad Company*, 5 Rich. Law (S. C.) 462, 27 Am. Dec. 768, and *Nettles v. Railroad Company*, 7 Rich. Law (S. C.) 190, 62 Am. Dec. 409, was more applicable to the facts of that case than the one followed. That suggestion is not inconsistent with the former cases followed by the trial court, nor with the rule stated by this court in the paragraph of the syllabus under consideration.

In the case of *Shaw & Austin v. S. C. Railroad Company*, *supra*, the goods shipped consisted of ten barrels of molasses, two of which leaked during transit. The consignee accepted eight barrels, but refused to accept the two that were leaking, and sued the carrier for the value of two full barrels. It was held that the plaintiff should have received all of the barrels and sued for the value of the amount of loss by leakage.

In the case of *Nettles v. Railroad Company*, *supra*, the carrier tendered the goods to the consignee, who refused to accept them, and sued for the value of the entire shipment. It was held that he ought to have received the goods and sued for the difference in their value when tendered and when they ought to have been delivered. It is true the damages were caused by delay in transit, but no question as to payment of freight was considered. The discussion related to the

Railway Co. v. Implement Co.

proper measure of damages. The case cannot, therefore, be considered of any weight as an authority here.

In the case of *Miami Company v. Railway Company*, 38 S. C. 78, 16 S. E. 339, the goods shipped consisted of kegs of powder, only a few of which were injured. The consignee refused to receive any of them and pay the freight, but sued in trover for the value of all. It will be observed that the damages complained of in that case were not the result of delay in delivery, but because of a direct injury to a part of the goods. In such a case it would not be unreasonable to say that when freight is shipped in bales, barrels, kegs or other forms where the injured parcels can be readily separated from those which are uninjured without affecting the value of the shipment as a whole, the rule as to whether the consignee would be entitled to the possession of the entire shipment without payment of freight might be different from that which should be applied when the entire shipment consists of a single machine, which cannot be separated without destroying its value. We conclude, therefore, that the case of *Miami Company v. Railway Company* does not decide the question here in controversy either way. The facts in the two cases are dissimilar.

The other cases cited by the plaintiff in error relate to what constitutes a conversion, and to the proper measure of damages where goods are injured in transit by the negligence of the carrier.

In argument the plaintiff in error objected to the rule stated by this court because of the embarrassments which might be imposed upon carriers by dissatisfied shippers. But the rule contended for by it would, in our view, enable carriers to impose much greater embarrassment upon shippers. A rule which would require a shipper to pay his debt to a carrier who owes him a greater sum does not seem to be a just and fair way to settle a controversy.

Railway Co. v. Implement Co.

It is conceded by the plaintiff in error that in an action by the carrier for the freight, after the goods had been delivered to the consignee, damages to the goods might be collected, and that replevin would lie against the carrier for the goods without payment of the freight if the damages equaled or exceeded the freight bill, but it insists that an action for the value of an entire shipment will only lie when there has been a conversion, which has not been shown here.

On the other hand, the defendant in error claims that both reason and authority sustain the law as stated in the paragraph of the syllabus objected to by the plaintiff in error. It argues that the right of the carrier to possession rests upon its lien for freight; that where the carrier becomes liable to the consignee, on account of damages to the property while in transit, in a sum equal to or greater than the freight bill, the lien thereby becomes extinguished, because "where there is no debt, there can be no lien." It argues further that under such circumstances the right of possession is in the consignee, and a refusal of the carrier to deliver upon demand constitutes conversion. In support of these contentions it cites the case of *Dyer v. Grand Trunk Railway Company*, 42 Vt. 441, 1 Am. Rep. 350. That was an action of replevin, but the court said, in substance, that when the damages to the goods equal the freight bill one debt offsets the other, and the lien of the carrier vanishes, leaving the right of possession in the owner. In the case of *Moran Bros. Co. v. Northern Pacific R. R. Co.*, 19 Wash. 266, 53 Pac. 49, the supreme court of Washington said:

"If a carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender; and the claim for freight and the claim for damages may be adjudicated in the replevin suit." (Syllabus.)

Section 515 of the second edition of Cobbey on Replevin reads:

"The right of a carrier to retain property until its charges for carriage are discharged rests upon the performance of the contract of carriage upon its part. If it has negligently delayed the delivery of the property at its destination, or otherwise subjected itself to liability for damages to the consignee in respect to the property carried, that would disentitle it to the extent of such liability to demand and recover freight; and if the damage should exceed the amount of the freight to which it would otherwise be entitled, of course it would not be entitled to demand and recover anything for the carriage of the property. And in such cases the owner or consignee may maintain replevin without a tender, and the claim for freight by the defendant, and the claim for damage by the plaintiff, at least to the extent of the freight charge, may be adjudicated in the replevin suit."

The case of *Charles E. Bancroft, plaintiff in error, v. Wm. E. Peters, defendant in error*, 4 Mich. 619, is to the same effect. In the case of *Marsh v. Union Pacific Ry. Co.*, 3 McCr. (U. S.) 236, 9 Fed. 873, 6 Am. & Eng. Rld. Cas. 359, Judge Hallett, of the United States district court for Colorado, held that trover would lie for the value of freight held by a carrier under a lien which did not exist. In volume 1 of Jones on Liens, second edition, section 331, it is said:

"The carrier's lien may be defeated by an injury to the goods carried, happening by the carrier's fault, to an amount larger than his charge for freight. His right to freight, and to detain the goods for its payment, results from his performance of the contract to carry the goods. If he fails to carry the goods and have them ready for delivery, he cannot claim his freight." (See, also, 8 A. & E. Encycl. of L., 1st ed., 978.)

The proposition seems reasonable that, when a carrier's lien is gone, subsequent retention of possession of freight against the wish of the owner is wrongful, and the owner may thereafter sue for the possession thereof in replevin or for the value as upon conversion.

 Kruse v. Fairchild.

We understand the general rule to be that a refusal to deliver the possession of personal property upon demand by an owner who has the right to possession amounts to a conversion, and the owner may sue for the value at once. (28 A. & E. Encycl. of L. 705; *Roberts v. Yarboro*, 41 Tex. 449; *Briggs v. Haycock*, 63 Cal. 343; *Nor. Trans. Co. v. Sellick*, 52 Ill. 249; *Singer Manuf. Co. v. King*, 14 R. I. 511.)

We conclude that the rule stated in the syllabus is more in harmony with modern procedure, and more in consonance with fairness between the parties and less liable to lead to embarrassments, than the rule contended for by the plaintiff in error, and therefore do not feel inclined to make any change therein.

All the Justices concurring.

HENRY KRUSE V. WILLIAM G. FAIRCHILD.

No. 14,538. (85 Pac. 303.)

SYLLABUS BY THE COURT.

TAX DEED—Description of the Property—Deed Held Void. In the sale and conveyance of real property for taxes a description is sufficient if it indicates such property with ordinary and reasonable certainty, and would be sufficient between grantor and grantee in an ordinary conveyance; but if it is so inapt and uncertain as to mislead the owner, or if it will not afford fair notice of the tax levied against his property, or how much of it was sold for taxes, the conveyance will be invalid. And it is further *held*, that the tax deed in question is void.

Error from Kiowa district court; EDWARD H. MADISON, judge. Opinion filed March 10, 1906. Affirmed.

John D. Beck, and *C. F. Jesse*, for plaintiff in error.
Fairchild & Lewis, for defendant in error.

73	308
76	777

73	308
381	245

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was brought by William G. Fairchild to recover from Henry Kruse lots 1, 2, 4, and 5, and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 5, township 30, range 17. It appears that Fairchild held the patent title to the land, and he also presented a tax deed issued in pursuance of a sale for the taxes of 1896, but it was conceded that the tax proceedings upon which that tax deed was based were illegal. Kruse rested his claim of title upon a tax deed executed to Clarence A. Farnum in 1894, and subsequent deeds purporting to convey the land to himself, but the trial court held the tax deed to be bad, and gave judgment for plaintiff. The validity of this tax deed is the main question in controversy.

It was attacked upon a number of grounds, including the uncertain and defective description of the land sold. In the tax deed the description of the property sold is: "The W. $\frac{1}{2}$, N. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$, N. W. $\frac{1}{4}$, of section 5, township 30, range 17 west of the 6th P. M., situated in the county of Kiowa and state of Kansas." The contention is that the description does not fit the land for which Fairchild asked a recovery. The land is a fractional section, a portion of which is subdivided and described as lots, and in the government survey of the land, as well as in all the transfers, the northern part of the land is described as lots 1, 2, 4, and 5. In attempting to show that the land sought to be recovered by Fairchild had been sold for taxes, and was the same land included in the Farnum tax deed, Kruse offered in evidence a plan of the government survey, as shown by the official plats and field-notes. The fol-

Kruse v. Fairchild.

lowing diagram shows the government plan of subdivision and description :

Lot 2.		Lot 1.	
Lot 6.	Lot 5.	Lot 4.	Lot 3.

In other conveyances offered in evidence by Kruse the descriptions of the land do not conform to that of the tax deed under which he claims. The county clerks are required to obtain from the land-offices abstracts of government lands that have become taxable since March of the previous year, and of course these are certified as they have been surveyed and subdivided by the government. (Gen. Stat. 1901, § 7575.) The assessor is required to make out a pertinent and correct description of each piece, lot or parcel of real property, in numerical order as to blocks, lots, sections, or subdivisions, in his township or city. (Gen. Stat. 1901, § 7569.) The taxing officers have the means of obtaining a correct description of the real property to be taxed, but it appears that the tax deed in question does not contain a correct or any recognized description of

Kruse v. Fairchild.

the land. Nor does it appear that the land had ever been described otherwise than as it had been subdivided and designated in the government survey. The patent, and every deed under which plaintiff claimed, described the land properly in accordance with the government plan. Even in the tax deed of plaintiff, which was conceded to be illegal, it was so described. All the intermediate instruments, from that of Farnum, the tax-title grantee, down to the defendant, accorded with the government survey, and there was nothing to show that there had ever been any other subdivision made of it.

A description is sufficient if it indicates the land with ordinary and reasonable certainty, but it should be so described that the owner may not be misled. It is important that he should be informed of the levy of a tax upon his land, and the amount of it, so that he may have the opportunity of paying the tax and saving the land from forfeiture and sale. It is equally important that he should have an opportunity to redeem the land after it has been sold for taxes. These opportunities are not afforded unless his land is identified by some pertinent description or designation. The one used in this instance is not pertinent or applicable to the land in question, and did not furnish the owner any fair means of identification. The description may have included some of the land in suit, but how much, or, if a part, what part of the whole, was taxed and sold cannot be determined from the inapt and indefinite description employed. The court ruled correctly in holding the tax deed to be invalid.

It may be noted, in passing, that there was omitted from the tax deed the county and state in which the assignee of the tax-sale certificate resided. This is a prescribed recital in the statutory form.

Another objection made to the deed is that the seal of the county clerk, instead of the seal of the county, was affixed. There is a recital in the instrument that

Zibold v. Reneer.

the county clerk has affixed the seal of the county. Under the authority of the recent case of *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139, this must be deemed a sufficient authentication. The judgment is affirmed.

All the Justices concurring.

73	312
181	22

ROSINA ZIBOLD *et al.* v. RUTH RENEER.

No. 14,539. (85 Pac. 290.)

SYLLABUS BY THE COURT.

1. **INTOXICATING LIQUORS—*Injury to Wife—Consequential Damages.*** Under section 2465 of the General Statutes of 1901, if a wife be injured in her means of support as the result of an act committed by her intoxicated husband, the person who sold or gave to him the liquors, the use of which produced the intoxication, will be liable to her in damages. This statute creates a cause of action unknown to the common law, and authorizes a recovery for both proximate and remote injuries.
2. ——— ***Petition—Conviction of Murder—Intoxication.*** Where, in an action by a wife for loss of means of support against one who is claimed to have sold her husband intoxicating liquors, by the use of which he became intoxicated, it is alleged in the petition that while so intoxicated he committed a homicide, was convicted of murder in the first degree, and sentenced to death, and confinement in the penitentiary until such time as an order should be issued by the governor for his execution, the allegation that he was convicted of murder in the first degree is not, as a matter of law, equivalent to an allegation that he was not intoxicated when he committed the homicide.

Error from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed March 10, 1906. Affirmed.

Waggener, Doster & Orr, for plaintiffs in error.

C. D. Walker, and J. L. Berry, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: Ruth Reneer obtained a judgment against Rosina Zibold and Emma Haegelin upon a petition which stated, substantially, that she was the wife of William D. Reneer; that the defendants were partners engaged in the manufacture and sale of intoxicating liquors, especially of beer, near the southwest part of the limits of the city of Atchison; that on Sunday, June 3, 1900, the defendants and their authorized agents, Carl Sheele and Kelly Haegelin, at the brewery of the defendants, unlawfully sold, furnished and gave to plaintiff's husband, and J. Burchart and C. T. Oathout, quantities of beer, which they drank, whereby they became intoxicated and were made boisterous, quarrelsome, and wholly indifferent and oblivious to conditions surrounding them; that while in this condition William D. Reneer shot and instantly killed Burchart and Oathout; that in consequence thereof he was informed against, tried, and convicted of murder in the first degree, and was on the 15th day of December, 1900, sentenced to death, and committed to the penitentiary, there to be confined and kept at hard labor until his execution upon a warrant of the governor of the state; that he still remained so confined, and would ever continue so to be until he should be executed. A statement followed concerning the earning capacity of William D. Reneer, and his age, and the plaintiff's dependence upon his labor and personal earnings for her means of support, of which she was deprived as a result of the intoxication of her husband produced by the use of the beer so furnished by the defendants to him.

A demurrer was interposed to this petition, which was overruled. A trial was had, and a verdict and judgment rendered for the plaintiff in the sum of \$5000. This proceeding is prosecuted to reverse the judgment.

Zibold v. Reneer.

Several assignments of error are argued at length in the briefs. The two vital questions, however, are presented by the demurrer to the petition. It is contended, first, that the petition shows upon its face that the sale of the intoxicating liquors by the defendants to the plaintiff's husband was not the direct and proximate cause of her loss; second, that the petition states that Reneer was convicted of murder in the first degree for the killing of Burchart and Oathout, which is conclusive that he was not intoxicated when he committed the homicide, and, therefore, the act of the defendants in furnishing the intoxicating liquors was not the proximate cause of plaintiff's loss of means of support.

There is no principle better settled at common law than that recoverable damages must be the proximate result of the wrongful act complained of, or that the wrongful act complained of must be the immediate and proximate cause of the injury for which a recovery is sought. Assuming that if the plaintiff be confined to this common-law rule she cannot succeed in her action, the demurrer to the petition should have been sustained, because the sale of the intoxicating liquors to Reneer and his intoxication from the use thereof were not the immediate and direct cause of the plaintiff's loss. The murder, arrest, trial, conviction, and sentence, resulting in the confinement of her husband in the penitentiary, constitute an independent, intervening cause, which was the proximate cause of her loss of support. Under the common-law rule the furnishing of the intoxicating liquor was only the cause of the cause. The statute under which plaintiff seeks to recover reads:

"Every wife, . . . who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, . . . shall have a right of action, in his or her own name, against any person who shall, by selling, bartering or giving intoxicating liquors,

have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered, the same as if unmarried." (Gen. Stat. 1901, § 2465.)

Similar statutory provisions are found in several of the states, but the decisions of the courts construing them are not in harmony on the proposition contended for by plaintiffs in error. By an act approved February 27, 1873, regulating the sale of intoxicating liquors in Indiana, it was provided:

"In addition to the remedy and right of action provided for in section 8 of this act, every husband, wife, . . . or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, . . . shall have a right of action . . . against any person or persons who shall, by selling, bartering, or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person." (Laws of Ind., 1873, ch. 59, § 12.)

In the case of *Krach et al. v. Heilman*, 53 Ind. 517, Krach sold and furnished intoxicating liquors to Heilman, of which the latter drank until he became so intoxicated that he was compelled to lie down in the bottom of his wagon while returning home. A barrel of salt in the wagon fell upon him, causing his death. His widow brought an action to recover damages for her loss of means of support, and the court held that she could not recover because the selling of the intoxicating liquors to Heilman was not the immediate and proximate cause of the plaintiff's loss. It was said in the opinion that "the rule of law is that the immediate, and not the remote, cause of an event is regarded." (Page 523.) The court's attention does not appear to have been turned to the statute under which the right of action was given, nor does there appear to have been any attempt to discover its meaning. No reference was made to the provision of the statute which gave the

cause of action, nor any attempt made to construe it, or give its language any meaning, except to determine that it created a new cause of action. The doctrine of this case was followed in *Collier v. Early*, 54 Ind. 559, and in *Backes v. Dant*, 55 Ind. 181, without comment and without any reference to the statute or to its application to such actions. Subsequently, in the case of *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, the court criticized *Krach et al. v. Heilman*, *supra*, and the cases following it, in this language:

"It is difficult, if not impossible, to reconcile the doctrine of the case under immediate mention with the earlier cases of *Fountain v. Draper*, 49 Ind. 441, *English v. Beard*, 51 Ind. 489, and *Barnaby v. Wood*, 50 Ind. 405, or the later one of *Schlosser v. State, ex rel.*, 55 Ind. 82. Nor has the doctrine anywhere found favor; on the contrary, it has been disapproved." (Page 533.)

In the later case of *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154, the defendant sold intoxicating liquor to plaintiff's husband, by the use of which he became intoxicated, and while intoxicated shot and killed Seth Nease, for which he was convicted of murder and confined in the penitentiary. The action was to recover damages for loss of support, under a statute somewhat different in form but in substance and effect identical with the one before the court in *Krach et al. v. Heilman*, *supra*. A recovery was had, and the court quoted and relied upon the rule of construction adopted in *Beers v. Walhizer*, 50 N. Y. Supr. Ct. 254. From an examination of these cases it will be seen that the common-law rule of recovery announced in *Krach et al. v. Heilman* is not now the law in Indiana. The Indiana statute is worded like our own, except that ours uses the words "in consequence of such intoxication" where the Indiana statute uses the words "on account of the use of such intoxicating liquors, so sold."

Our attention is also called to the cases of *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359, *Schmidt et al. v.*

Mitchell, 84 Ill. 195, 25 Am. Rep. 446, and *Schulte v. Schleeper*, 210 Ill. 357, 71 N. E. 325, wherein that court, in construing a statute substantially like our own, held that the furnishing of the intoxicating liquor must be the proximate cause of the injury or loss for which a recovery is sought, or, in other words, that the common-law rule was not changed by the statute.

It is probable that there are other states which have adopted the Illinois rule of construction, and while such precedents are of great weight the reasoning is neither convincing nor satisfactory. The legislature created a right of action unknown to the common law; in creating this new right it could, and did, extend the rule to include consequential and remote damages.

The excessive use of intoxicating liquors as a beverage is an unmixed evil. The only purpose accomplished by it is to breed and propagate vice. The legislative shafts have been leveled at this practice in nearly, if not every, state and in almost every conceivable manner which looked toward its regulation, control, or entire suppression. It is quite in accord with this policy that Kansas passed the statute invoked by the defendant in error. It was known to the legislature, as it is to all other persons, that the use of intoxicating liquors as a beverage makes drunkards; that an intoxicated person is incapable of caring for himself, is always in danger of being injured, and is likely to inflict injury upon others, at the cost of his liberty—possibly his life; that he habitually neglects his business and family; that the harm resulting from the excessive use of intoxicating liquors always falls most pitilessly upon the dependents of the user, not infrequently pauperizing himself and family. The idea naturally suggested itself to the legislature that if the sellers of intoxicants were made liable to those who should sustain injury to person or property or means of support by an intoxicated person, or in consequence of intoxication, the

hazard would be so great that fewer persons would engage in the business, and those who should engage in it would exercise more caution. The legislature, therefore, gave a cause of action and created a liability for these injuries where none existed at common law.

It is apparent that it was the intention of the legislature to make this remedy effective and of practical utility, and that its enforcement should not be hampered by technical common-law rules. It was intended to provide a remedy against the persons furnishing the liquor which should produce the intoxication, where the injuries sustained in person, property or means of support should result, in whole or in part, from such intoxication. Any other construction would, in a large measure, defeat the object of the statute. Persons who are openly engaged in a business prohibited by law, the results of which are to enrich themselves and make paupers and criminals of others, have no complaint against a liberal construction of a statute intended to make them responsible in civil damages to those who have been injured as a result of the illegal traffic in which they are engaged.

This court does not stand alone in this construction of the statute. There are many cases which hold that these statutes creating a new cause of action by their terms clearly eliminate the common-law rule of proximate cause, and that the plaintiff may recover where the loss sustained is the result of intoxication induced, in whole or in part, by liquors furnished by the defendant. Among these, the leading case is *Beers v. Walhizer*, 50 N. Y. Supr. Ct. 254. The statute under consideration was substantially like ours. The facts upon which the plaintiff relied were that the defendant sold her husband intoxicating liquors, the use of which caused him to become intoxicated; and while intoxicated, and in consequence thereof, he shot and killed one Banfield, for which he was arrested, convicted, and sentenced to a term of years in the penitentiary. The

contention there, as here, was that the selling of the intoxicating liquor was not the proximate cause of the loss sustained by the plaintiff. It was said in the opinion:

"Under the act it is necessary that two facts should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to wit, intoxication resulting from its use, in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change of the common-law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication." (Page 256.)

This doctrine was approved and followed in *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154. In the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, the court said:

"The legislature . . . may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the act of 1873." (Page 524.)

In the case of *Volans v. Owen et al.*, 74 N. Y. 526, 529, 30 Am. Rep. 337, it was remarked:

"Both direct and consequential injuries are plainly included in the remedy given, and the legislature, by giving a right of action for injury to 'means of support'—a cause of action unknown to the common law—evidently intended to create a new ground and right of action."

In *Mead v. Stratton et al.*, 87 N. Y. 493, 41 Am. Rep. 386, it was held that the statute provided for a recovery by action for injuries to person or property or

Zibold v. Reneer.

means of support, without any restriction whatever, and that both direct and consequential injuries were included. It is evident that the legislature intended to go, in such a case, far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing, or who caused, such intoxication. The same interpretation was placed upon the statute in *Neu v. McKechnie et al.*, 95 N. Y. 632, 47 Am. Rep. 89.

The contention that the allegation in the petition that Reneer was convicted of murder in the first degree is conclusive that he was not intoxicated when he committed the homicide cannot be sustained. The reasoning upon this proposition is that one cannot be convicted of murder in the first degree who is intoxicated at the time of the commission of the homicide. Intoxication is not of itself a defense to a charge of murder in the first degree. It does not follow that because a man is intoxicated his mind is necessarily so enfeebled thereby that he is incapable of deliberating or forming a purpose. One may be intoxicated and entertain, and act from, malice; he may be intoxicated and entertain a determination to commit murder; indeed, the intoxication may suggest the murderous thought. For a person to be too drunk to entertain an intent to kill it would seem that he would have to be too drunk to entertain an intent to shoot. (*The State v. White*, 14 Kan. 538; *The State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *The State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.)

The other assignments of error have been examined, and nothing prejudicial to the plaintiffs in error is found. The judgment is affirmed.

All the Justices concurring.

SARAH E. WILKINS V. BARNEY LEE, JR., *et al.*

No. 14,541. (85 Pac. 140.)

SYLLABUS BY THE COURT.

TRESPASS—*Real Estate—Bill of Particulars.* The bill of particulars involved in this controversy examined and held not to state a cause of action for trespass on real estate within the meaning of section 6 of the code of civil procedure before justices.

Error from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed March 10, 1906. Affirmed.

J. M. Challiss, for plaintiff in error.

Adams & Conlon, for defendants in error.

The opinion of the court was delivered by

BURCH, J.: The question for decision in this case is whether a bill of particulars filed before a justice of the peace states a cause of action for trespass on real estate. If it does the matter was beyond his jurisdiction, the damages claimed exceeding \$100. (Justices' Code, § 6; Gen. Stat. 1901, § 5233.)

The justice rendered judgment for the plaintiff. The defendant appealed to the district court and the plaintiff was again successful. The question of jurisdiction was first raised by a motion filed after the trial in the district court. The motion was denied. The defendant then commenced a separate suit to enjoin the enforcement of the judgment of the district court on the ground that it is utterly void. Having been denied that relief he prosecutes this proceeding in error. The bill of particulars reads as follows:

"Plaintiff for cause of action alleges: That he is the owner by lease of certain crops, to wit, corn, hay, and grass, on what is known as the Cavanaugh farm, in Mount Pleasant township, Atchison county, Kansas, and at all times hereinafter mentioned was such owner

Wilkins v. Lee.

of said crops so growing on said premises; that the defendant is the owner of certain cattle which were kept on adjoining land part of the time, and permitted them to trespass upon the land of this plaintiff, and permitted the division fence between the land of the plaintiff and the land on which she permitted said cattle to run to become down so that the same was not a legal fence or sufficient to prevent the said cattle from trespassing upon the land of this plaintiff, and said cattle did trespass upon the lands of this plaintiff, and did enter thereon through the said insufficient fence of the defendant, and did tramp down and eat and destroy all the corn on fourteen acres thereof, and did damage and destroy a part of a twenty-acre field, and did tramp, eat and destroy several acres of grass and meadow of the plaintiff; in all to his damage in the sum of \$200.

"Whereof, plaintiff asks judgment against the said defendant for the sum of \$200 and the costs of this action."

It has been decided by this court that the action referred to in section 6 of the justices' code is the equivalent of the common-law action of trespass *quare clausum fregit*. (*Kaub v. Mitchell*, 12 Kan. 57, 60; *St. L. & S. F. Rly. Co. v. Sharp*, 27 Kan. 134.) It has also been decided by this court that trespass *quare clausum fregit* is a possessory action brought because of a disturbance of the peaceable possession of plaintiff. (*Hefley v. Baker*, 19 Kan. 9.)

The gist of the action is the wrongful entry—the breaking in upon and the interruption of the quietude of the plaintiff's possession, and whatever follows in the nature of damages to buildings, fences, crops or other property is mere aggravation. To maintain the action, possession of the premises upon which the property destroyed is situated, by the plaintiff personally or by his tenant, is indispensable. (*Loring v. Rockwood*, 13 Kan. 178, 181; *Fitzpatrick v. Gebhart*, 7 Kan. 35, 42.) The decisions of other states to this effect are collated in volume 46 of the *American Digest*, Century edition, page 295. Without something

to indicate that the pleader intended to allege and rely upon possession as an element of his cause of action no issue could be framed upon that subject; no proof could be offered concerning it, and no judgment could be rendered presupposing possession in the plaintiff.

The bill of particulars contains no allegation relating to possession. Much stress is laid upon the fact that it makes several references to "land of the plaintiff." The first paragraph, however, limits the meaning of all such expressions to the Cavanaugh farm in Mount Pleasant township, which, so far as the pleading shows, may have been in the possession of Cavanaugh or any one else other than the plaintiff, with no right in the plaintiff under his lease except to enter and gather his corn and cut his meadow.

The allegations relating to the negligence of the defendant in permitting the division fence between the lands of the respective parties to become defective, so that it no longer constituted a legal fence, are quite foreign to an action of trespass *quare clausum fregit*. They are, however, characteristic of an action on the case for damages occasioned by cattle negligently allowed to escape, and clearly indicate the theory upon which the bill of particulars was drawn.

It is immaterial that the allegations may not be entirely sufficient to make a case under the fence law. That fact does not destroy jurisdiction, and the pleader certainly did not intend to state a case which the court could not try at all. It is immaterial that growing crops and hay are regarded for almost all purposes as forming a part of the real estate. Trespass on the case was a common form of action for the recovery of damages for injuries to such property, and that it may be employed under circumstances similar to those under consideration is shown by the decision in *St. L. & S. F. Rly. Co. v. Sharp*, 27 Kan. 134.

If the character of the action were more doubtful than it appears to be the bill of particulars should be

Wisner v. Barber County.

given a liberal interpretation in favor of jurisdiction. The plaintiff in error submitted to the authority of both courts until each one had decided against him, and now ought not to be permitted to defeat the jurisdiction he so long acknowledged upon any but the most meritorious ground.

The judgment of the district court is affirmed.

All the Justices concurring.

SARAH E. WISNER V. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBER *et al.*

No. 14,542. (85 Pac. 288.)

SYLLABUS BY THE COURT.

PETITION—*Alteration of a Public Road.* A defective statement of the change prayed for will not render void a petition for the alteration of a public road, where notwithstanding such defect the purpose of the petition can be gathered from the language used.

Error from Barber district court; PRESTON B. GILLET, judge. Opinion filed March 10, 1906. Affirmed.

Noble & Tincher, for plaintiff in error.

C. C. Coleman, attorney-general, and *Samuel Griffin*, county attorney, for defendants in error.

The opinion of the court was delivered by

MASON, J.: A petition was presented to the commissioners of Barber county for the alteration of a highway. Viewers were appointed, and upon their report the board ordered the desired change. Mrs. Sarah E. Wisner, a landowner whose interests were affected, filed a petition in error in the district court attacking the validity of the proceedings upon the ground that the road petition was void and conferred no jurisdic-

Wisner v. Barber County.

tion on the county board, for the reason that it did not intelligibly indicate what action the petitioners wished to have taken. The district court held that the petition was sufficient, and rendered judgment accordingly. Mrs. Wisner prosecutes error. The road petition in question reads as follows:

"The undersigned petitioners, householders of the county of Barber, state of Kansas, and residing in the vicinity of the road herein prayed for, respectfully petition your honorable body to cause to be reviewed, altered, and changed, the following-described road, viz.:

"Road No. 141, commencing at the southeast corner of the southwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section three (3), township thirty-two (32) south, of range ten (10) west of the sixth P. M.; thence north on quarter quarter-line, according to the Tweedale survey of 1884, to intersect original road No. 141, said road to be forty feet wide. And your petitioners will, as in duty bound, ever pray, etc."

The defendants in error maintain that the obvious meaning of this is that the petitioners ask that road No. 141 be changed so as to conform to the description given. The plaintiff in error insists that to have that effect the petition should have employed some such formula as the following: "To cause to be reviewed, altered and changed the following-numbered road, viz., road No. 141, *so that said road shall be located as follows*, commencing," etc.

Clearness would doubtless have been promoted by such a statement, but we think the form that was used was capable of being construed to mean the same thing. It is plain that such is the meaning intended, or that there is an entire failure to express any intelligible idea. The effort should of course be to give force to the language employed, if possible, rather than to reject it as meaningless. We think the court properly held that the petition was sufficient.

The district court dismissed the petition in error instead of affirming the action of the commissioners, but

Disney v. Healey.

as it is manifest from the record that the ruling was made upon the merits of the controversy the form of the order is not regarded as material. The judgment is affirmed.

All the Justices concurring.

W. O. DISNEY V. THOMAS J. HEALEY *et al.*

No. 14,545. (85 Pac. 287.)

SYLLABUS BY THE COURT.

1. **LIMITATION OF ACTIONS**—*New Promise—Tolling the Statute.* The petition in this case had letters attached which were alleged to have been written by Thomas J. Healey, one of the makers of the note, to the payee thereof. *Held*, that the letters were *prima facie* an acknowledgment of the debt, and tolled the statute of limitations as to their author.
2. **CONTRACTS**—*Agreement by Grantee to Pay Grantor's Debt—Liability.* A grantee who accepts a deed of conveyance of land, and by a contract not set forth in the deed agrees to pay the grantor's debt secured by a mortgage on the land, is liable on such contract in an action by the mortgagee, even if a recovery on the note secured by the mortgage would have been barred by the statute of limitations but for an acknowledgment of the indebtedness by the grantor which tolled the statute as to him, provided such acknowledgment was made before the conveyance.

Error from Logan district court; JAMES H. REEDER, judge. Opinion filed March 10, 1906. Reversed.

STATEMENT.

THIS action was commenced on the 25th day of February, 1905, by the plaintiff in error, in the district court of Logan county, upon a promissory note secured by a real-estate mortgage given by defendants Thomas J. Healey and wife, which note by its terms matured December 1, 1895. To the petition were attached, as exhibits, alleged copies of letters written by

Disney v. Healey.

Healey to the plaintiff, which letters, it is claimed, tolled the statute of limitations. The petition also alleged that shortly before the commencement of the action Healey and wife had conveyed the mortgaged premises by deed to defendant Jordan. The defendants filed a general demurrer to the petition, which demurrer was by the court sustained, and, the plaintiff electing to stand upon his petition, the court rendered judgment against him and he brings the case here for review.

Lee Monroe, W. F. Schock, and E. P. Hotchkiss, for plaintiff in error.

W. H. Wagner, and Roark & Roark, for defendants in error.

The opinion of the court was delivered by

SMITH, J.: Several of the letters attached as exhibits to the petition seemed to acknowledge an indebtedness or obligation from Healey to Disney; probably the following, under the date of April 9, 1900, less than five years before the commencement of this action, is the strongest, to wit:

"*W. O. Disney, Russell Springs, Kan.*: DEAR SIR AND FRIEND—Yours enclosing deed to execute received. You don't say anything about canceling my note. I am willing to make the deed, but must have the note and mortgage released, and note returned to me.

Yours truly, T. J. HEALEY."

We think this is a sufficient acknowledgment of an indebtedness to toll the statute, being, in effect, a proposition to deed land in consideration of the release of the note and mortgage and the return of the note. (*Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925.) Healey had the legal title to the land at the time he acknowledged the indebtedness.

The question remains whether the defendant Jordan was bound by his alleged contract with Healey to assume and pay the latter's indebtedness to the plaintiff.

The State v. Learned.

It was said by Mr. Justice Brewer, in *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765:

“Where a note and mortgage are once barred, a subsequent revivor of the note by part payment, promise, or acknowledgment of the payor, will revive the mortgage so far as it affects the interest of the payor in the mortgaged premises.” (Syllabus.)

The mortgage, as well as the note, was therefore revived as to Healey at the time of the conveyance, by himself and wife, of the land to Jordan, and the latter took it subject to the mortgage lien, and agreed, in consideration, or in part consideration, of such conveyance, to pay the mortgage indebtedness. The mortgage was revived as to him, and the statute of limitations as to him commenced to run at the time of such conveyance. (*Schmucker v. Sibert, supra.*)

The judgment of the district court is reversed, and a new trial granted.

All the Justices concurring.

THE STATE OF KANSAS V. WILLIAM LEARNED.

No. 14,711. (85 Pac. 293.)

SYLLABUS BY THE COURT.

1. **CRIMINAL LAW**—*Incest and Rape are Distinct Offenses.* A plea in bar of a prosecution for incest which sets forth that the defendant has been tried for, and acquitted of, the crime of statutory rape upon the same woman, for the same act, is not a good plea.
2. ——— *Discharge of One Joint Defendant Will Not Avail the Other.* Nor, in such a case, is it a good plea in bar or a sufficient ground for quashing the information that the action against the woman who was *particeps criminis* has, on request of the county attorney, been dismissed and abated as to her for the purpose of making her a witness for the state.
3. ——— *Incest—Girl under Eighteen.* A man may be guilty of incest with a girl under eighteen years of age.

The State v. Learned.

4. ——— *Information Held Sufficient.* A count of an information which charges that at a certain time and place, within the jurisdiction of the court, a man (naming him) and a woman (naming her), he being a married man and the grandfather of the woman, and she being an unmarried woman and being his granddaughter, "did then and there unlawfully, feloniously and incestuously have sexual intercourse with each other" is sufficient, and it is not requisite to allege that they committed adultery, or fornication, with each other.

Appeal from Stafford district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed March 10, 1906. Reversed.

STATEMENT.

ON the 20th day of April, 1905, the county attorney of Stafford county, Kansas, filed an information in the district court against William Learned and Bertha M. Austin, charging, or attempting to charge, both of the defendants jointly with incest with each other. There were six counts in the information. The first count charged that the offense was committed on the ——— day of July, 1903, the second count on the ——— day of November, 1903, the third count on the ——— day of November, 1903. The fourth and fifth counts charged the offenses as having been committed on the ——— day of February, 1904, and subsequently to the 12th day of the month. The sixth count charged that the offense was committed on the ——— day of June, 1904. Each count, after the first, charged that the offense therein alleged was separate and distinct from any offense charged in any other count in the information. At the October, 1905, term of court, the case being called, the county attorney requested the court to discharge Bertha M. Austin, for the purpose of using her as a witness in the action, which request was allowed. She was discharged, and the action was abated as to her. Thereupon the defendant, Learned, filed his plea in bar to the first five counts of the information, and, as grounds therefor, alleged that prior to the 8th day of February, 1905, an information had been duly filed against him in the district court of Stafford county

charging him with the crime of statutory rape against the person of Bertha M. Austin; that on the 8th day of February, 1905, the court having full jurisdiction of the premises, he had been tried by a jury on the charge, and acquitted; that the offense of which he had been acquitted was the same as the offenses set out in counts 1, 2, 3, 4, and 5; and that he should not again be put in jeopardy so far as those counts were concerned. The state filed its answer and admitted the trial and acquittal of Learned as pleaded, but alleged that only one offense was charged in the former action, and that it was not the same offense as charged in counts 1, 2, 3, 4 and 5 in this action; that the former offense of which Learned was acquitted and the five offenses charged in the information in question were not the same in law nor in fact; and that the only matter involved in the former action was whether Learned had sexual intercourse with Bertha M. Austin prior to the 12th day of February, 1904, and subsequently to the 1st day of January, 1904. It was also alleged in the answer and admitted by the defendant that Bertha M. Austin became eighteen years of age on the 12th day of February, 1904. To this answer the defendant filed a general demurrer. On the hearing thereof the court sustained the demurrer, so far as the same related to counts 1, 2 and 3 of the information, abating the action as to those counts, and overruled the same as to counts 4 and 5. The state reserved the question as to the ruling on counts 1, 2, and 3. Thereupon the defendant filed a motion to quash the information as to counts 4, 5, and 6, which was allowed by the court, to which ruling the state excepted and reserved the question, and, being tendered leave to amend the information, elected to stand thereon, and brings the case to this court for review.

C. C. Coleman, attorney-general, *G. W. Alford*, county attorney, and *Ray H. Beals*, for The State; *C. G. Webb*, and *T. W. Moseley*, of counsel.

Henry C. Sluss, and *Fairchild & Lewis*, for appellee.

The opinion of the court was delivered by

SMITH, J.: The distinctive ingredient of the crime of incest is the relationship of the parties, while the distinctive ingredient of the crime of statutory rape is the youthfulness of the female. The evidence necessary to convict of incest would not be sufficient to convict of statutory rape, as there need be no evidence as to the age of the female. On the other hand, evidence that would convict of statutory rape would not suffice to convict of incest, as the relationship is wanting. Hence the crimes, although committed by the same act, are different crimes; and a prosecution for one is no bar to a prosecution for the other. (*The State v. Patterson*, 66 Kan. 447, 71 Pac. 860.)

The plea in bar as to the first five counts of the information and the motion to quash the last three counts were based in part upon the dismissal of, and the abatement of the action as to, Bertha M. Austin, which was done for the purpose of using her as a witness against her codefendant, Learned. This ground is untenable. The two *participes criminis* were jointly charged, and one could be tried and convicted without the other. This is held to be the law, even in states where the concurrent consent of both parties is essential to constitute the crime. (16 A. & E. Encycl. of L. 135.) The case of *The State v. Hook*, 4 Kan. App. 451, 46 Pac. 44, which holds to the contrary, is disapproved.

Again, it is urged that the plea in bar, as to the first three counts of the information at least, should have been sustained, as the answer to the plea admitted that the girl was under eighteen years of age at the times each of these offenses were alleged to have been committed; that by our statute an essential ingredient of the offense is the joint criminality, and that it can be committed only by the concurrent consent of the man and the woman; and that by the laws of this state a female under eighteen years of age is incapable of consenting to sexual intercourse. The supreme courts of

several states have held that the assent of both to the act is essential, while in several other states it has been held that the consent of both is not essential. (16 A. & E. Encycl. of L. 135.) In all of the states which hold that the assent of both is not essential the statutes are very different from ours. No statute of any state has been found by the writer which seems more strongly to imply that the joint consent is requisite than our own. Our statute denounces the penalty against both equally. The statutes of some of the states do not.

The inquiry then arises, Can a girl under the age of eighteen years consent to an act of sexual intercourse with one within the degrees of relationship within which marriage is incestuous and void, and thus become guilty of incest? If not, why not? There is no statutory provision or common-law rule to the contrary. Section 2016 of the General Statutes of 1901, commonly called the age-of-consent law, simply provides that "every person who shall be convicted of rape, either by carnally and unlawfully knowing any female under the age of eighteen years, or," etc. This does not disqualify the female under eighteen years from consenting, but provides, in effect, that her consent is no defense; that notwithstanding her consent the act, on the part of the man, constitutes the crime of rape. (*The State v. Woods*, 49 Kan. 237, 30 Pac. 520; *The State v. White*, 44 Kan. 514, 520, 25 Pac. 33.) We answer the question in the affirmative. A female under the age of eighteen years may be guilty of the crime of incest.

The only question remaining is whether the motion to quash counts 4, 5 and 6 should have been allowed on the ground that the counts do not state the offense "with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case." (Gen. Stat. 1901, § 5551.) We answer this question in the negative. Section 2219 of the General Statutes of 1901 reads: "Persons within

The State v. Learned.

the degrees of consanguinity within which marriages are by law declared to be incestuous and void, . . . who shall commit adultery or fornication with each other, . . . shall upon conviction be punished," etc. These counts of the information, in addition to the time and venue of the alleged offense and the relationship of the parties, charged "that . . . one William Learned, being then and there a married man, and one Bertha M. Austin, being then and there an unmarried female, did then and there unlawfully, feloniously and incestuously have sexual intercourse with each other." It is said that the information must charge that they committed adultery, or fornication, with each other. It has been so frequently decided by this court that it is not requisite that the exact language of the statute be used, but that other language of like import may be employed, that the citation of the cases is unnecessary. The language used is the exact equivalent of the statutory words, and each of these counts contains "a statement of the facts constituting the offense, in plain and concise language, without repetition." (Gen. Stat. 1901, § 5545.)

"If a married man have criminal intercourse with his own daughter, she being a single woman, he is guilty of incestuous adultery, and she of incestuous fornication." (*Cook v. The State of Georgia*, 11 Ga. 53, 56 Am. Dec. 410, syllabus.)

The order of the district court sustaining the plea in bar as to counts 1, 2, and 3, the judgment thereon, and the order granting the motion to quash as to counts 4, 5, and 6, with the order of dismissal of the action, are vacated, and the case is remanded for further proceedings.

All the Justices concurring.

73	334
74	671

THE STATE OF KANSAS V. CHARLES L. WILSON.

No. 13,737. (80 Pac. 639.)

SYLLABUS BY THE COURT.

1. **STATUTORY CONSTRUCTION**—*Statute Prohibiting Combinations Not Repealed by Subsequent Enactment.* Chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), prohibiting combinations to prevent competition among persons engaged in buying or selling live stock, is not superseded by the general antitrust law of 1897 (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874), but is still in force. (See *post*, p. 343.)
2. **CONTRACTS**—*Commissions for Buying and Selling Live Stock—Legislative Restrictions.* The intention of the legislature as to restrictions to be placed upon agreements among persons engaged in buying and selling live stock for others for the control of the commissions to be charged must be determined from the act of 1891, above cited, having specific relation thereto, and not from the general antitrust act of 1897 or from that of 1889 (Laws 1889, ch. 257; Gen. Stat. 1901, §§ 2430-2438).
3. **MONOPOLIES**—*Dealing in Live Stock—Statute Construed.* The act of 1891 above cited forbids agreements to maintain minimum rates of commission for services in the sale of live stock for others, but contains no such prohibition as to agreements concerning charges to be made for services in purchasing live stock.
4. ——— *Mortgage Given to Secure Purchase-money and Commissions—Validity.* Where a member of an association having for one of its purposes the maintenance of a minimum rate of charges for services in buying or selling live stock for others purchases cattle for another, and in pursuance of a by-law of such association charges a commission for such services at the rate of fifty cents per head, which is included in the amount of a note and mortgage given to such member of such association by the purchaser in payment for such cattle, such mortgage is not on account thereof rendered void by the provisions of any of the statutes above cited.
5. **CRIMINAL LAW**—*Obtaining Money by False Pretenses—Information.* In a prosecution for obtaining money by false pretenses by selling property encumbered by a mortgage under the representation that it is clear, it is not essential that the information should show whether the mortgagee, described as "the A. J. Gillespie Commission Company," is a corporation or a partnership.

The State v. Wilson.

6. ——— *Same*. In such prosecution an allegation of the information that at the time of the sale the property was encumbered by a mortgage sufficiently charges that the mortgage was unpaid.
7. ——— *Allegations and Proof—Variance*. In such a prosecution the proof of a mortgage given for \$13,866.80, the amount stated in the information being \$13,366.80, is not a fatal variance.
8. ——— *Same*. In such a prosecution the allegation of the information that the mortgage had been by the mortgagee assigned to, and was owned by, a bank and one Louis Hax is sufficiently sustained by proof that the mortgagee had sold the two notes secured by the mortgage, under a blank indorsement, to a buyer who in turn without further writing sold and delivered them to the bank, and that the bank then sold one of them to Hax.
9. ——— *Draft—Defendant's Title as Trustee Not Conclusively Shown*. In such a prosecution the fact that the draft charged to have been fraudulently obtained by the defendant was made payable to him "for the use of" the person alleged to have been defrauded does not conclusively show that the defendant acquired title to it only as a trustee, but is open to the explanation that the words quoted were intended as a mere memorandum to indicate upon whose account the payment was made.

Appeal from Shawnee district court; Z. T. HAZEN, judge. First opinion filed April 8, 1905. Affirmed. Rehearing granted June 10, 1905. Second opinion filed April 7, 1906. Reversed.

C. C. Coleman, attorney-general, Otis E. Hungate, county attorney, and Aaron P. Jetmore, for The State; Frank Hagerman, and Botsford, Deatherage & Young, as *amici curiæ*.

Eugene Hagan, A. F. Williams, A. E. Crane, and Hayden & Hayden, for appellant; D. R. Hite, of counsel.

The opinion of the court was delivered by

MASON, J.: Charles L. Wilson appeals from a conviction upon a charge of fraudulently obtaining property by false pretenses. The evidence of the state

tended to show that in October, 1898, Wilson and one George Maris purchased a herd of 402 steers, in payment for which they executed two notes to the A. J. Gillespie Commission Company for the aggregate amount of \$13,366.80, secured by a mortgage upon the cattle; that in the following December they sold 397 of these steers to the Elk Grove Land and Cattle Company, under the representation that they were clear of all encumbrance, obtaining in payment a check for \$500 and a draft for \$10,547; and that the buyer was compelled to lose the cattle or pay the mortgage.

A large number of assignments of error have been made and argued, but the one most urgently presented is based upon a contention of the defendant that the cattle were in fact unencumbered because the mortgage executed by himself and Maris was rendered incapable of enforcement by various provisions of the Kansas statutes known generically as the antitrust laws. This question was raised in the trial court by an offer on the part of the defendant to prove that the A. J. Gillespie Commission Company was a member of a voluntary association known as the Kansas City Live-stock Exchange, composed of persons and corporations engaged in the business of buying and selling live stock for themselves and for others, organized for unlawful purposes, among which was that of fixing and maintaining a minimum charge for commissions for their services in buying and selling cattle for others, such minimum charge being established by a by-law at fifty cents per head; that the cattle here involved were purchased by the Gillespie company for the defendant and Maris, a commission being charged in pursuance of the by-law referred to, amounting to \$201, which was included in the sum for which the notes and mortgage were given. The offer was made in greater detail than here shown, and included a tender of a copy of the articles of association, rules and by-laws of the live-stock exchange. It was rejected by the court, and the con-

The State v. Wilson.

trovery so far as this matter is concerned turns upon the correctness of that ruling.

Defendant in support of his contention invokes three statutes, enacted in different years—chapter 257 of the Laws of 1889 (Gen. Stat. 1901, §§ 2430-2438), chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), and chapter 265 of the Laws of 1897 (Gen. Stat. 1901, §§ 7864-7874). The first of these forbids certain contracts in restraint of trade. The second is narrow in its scope, and applies only to persons or corporations engaged in buying or selling live stock, who are prohibited by it from entering into any agreement to control the amount to be charged as compensation for services in making sales of live stock for others. The third is very sweeping in its provisions. It defines and denounces five kinds of combinations, which it denominates trusts. The definitions are couched in general terms, but cover almost every conceivable device by which freedom of commerce might be hampered, competition restricted, or the price of commodities controlled. All acts done in pursuance of any of the arrangements interdicted by these various statutes are made misdemeanors. The act of 1897 also contains these provisions:

"Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof that . . . the cause of action grows out of any business transaction in violation of this act." (Gen. Stat. 1901, § 7870.)

The argument in behalf of the defendant is that, assuming the truth of the rejected evidence, the Kansas City Live-stock Exchange was an unlawful combination under each of these statutes; that in charging the defendant \$201 as a commission for services in buying 402 head of cattle for him the Gillespie company acted under and in pursuance of the unlawful bond which

united the members of the exchange, and thereby was guilty of a public offense; that the mortgage was unenforceable both because \$201 of its consideration was on this account illegal and because it was made in violation of the provisions of the statute of 1897, or grew out of a business transaction in violation of that statute.

It may be assumed for the purposes of the case that the live-stock exchange was a trust within the meaning of the law of 1897 by reason of a number of its rules other than those relating to the regulation of commission charges. There are provisions of that law which purport to make such fact alone a complete bar to the enforcement of a contract made in this state by one of its members. Such provisions must be interpreted, however, as applying only to contracts made pursuant to the illegal combination, and in furtherance of its unlawful purposes. (*Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883; *The State v. Jack*, 69 Kan. 387, 76 Pac. 911.) Whether this mortgage was a contract of that character is the pertinent inquiry in this connection. The mere fact that the Gillespie company was a member of a trust when it bought these cattle for Wilson, paid for them, and took his notes and mortgage for the amount, did not taint the transaction with illegality. The feature of the proceeding of which complaint is made, and which causes the doubt of its validity, is the charge of a commission for services in making such purchase at the rate of fifty cents a head—the minimum rate fixed by the unlawful association. This being true, the mortgage was void only in case an agreement to maintain a minimum rate for such services is held to be one of those forbidden by statute.

There are general expressions in the law of 1897 which, if given a liberal construction, might be held to prohibit such an agreement; for instance, those directed against combinations intended "to create or carry out restrictions in trade or commerce, or aids to commerce," or "to carry out restrictions in the full and

free pursuit of any business," or "to increase or reduce the price of merchandise, produce, or commodities," or "to prevent competition in the . . . sale or purchase of merchandise, produce, or commodities, or to prevent competition in aid to commerce," or "to fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state." (Gen. Stat. 1901, § 7864.) The statute being penal, however, requires a strict rather than a free construction. Moreover, its interpretation is affected by another consideration. The act of 1897 is so similar in many respects to that of 1889 as to give plausibility to the suggestion that it was intended to cover the whole of the subject-matter of the earlier statute and entirely to supersede it. (*The State v. Smiley*, 65 Kan. 240, 69 Pac. 199.) On the other hand, the act of 1891 is so specific in its terms, and there is such a lack of any apparent attempt to accomplish its precise purpose by the later enactment, that there is little room for a contention that it has been repealed by implication, and we regard it as still in force. This being decided, the two acts, since they relate to the same general subject, must be construed together, as though parts of the same enactment. (*Wren & Clawson v. Comm'rs of Nemaha Co.*, 24 Kan. 301.) The precise scope of the earlier one is indicated by its title, which is "An act prohibiting combinations to prevent competition among persons engaged in buying or selling live stock," etc. In the later enactment there is no reference to this subject by any terms more definite than those already quoted. In this situation, it is to the specific statute, and not to the general one, that we must look for an expression of the intent of the legislature with regard to the matter of regulating the business of buying and selling cattle upon commission, and the prohibition against the transaction complained of by defendant must be found, if at all, in the statute of

1891, and not in that of 1897. (*Long v. Culp*, 14 Kan. 412.)

Upon a cursory inspection the act of 1891 may seem abundantly sufficient to stamp as illegal any agreement for the control of the commission to be charged for services either in buying or selling live stock. A careful reading, however, discloses that while the persons against whom it is directed are described as those engaged in the business of *buying or selling* live stock upon commission, the agreements declared to be illegal are in every instance those relating to the establishment of fixed or minimum charges for services in the *sale*, but not in the *purchase*, of live stock for others. This cannot be deemed the result of a mere error, clerical or otherwise, for the expression occurs no less than four times. Why the legislature should have made a distinction between agreements relating to commissions for selling and those relating to commissions for buying is not a matter of inquiry here; that it has done so admits of no doubt. We cannot insert in the law an inhibition against the establishment of minimum charges for services in buying cattle, nor can we ignore the effect of the omission of the legislature so to do. As the commission charged to the defendant by the Gillespie company was for the purchase of cattle for him, not for their sale, it was not under the ban of the statute and did not invalidate the mortgage. If the law of 1889 is to be considered still in force the application of its general provisions to the matter here involved must be denied, upon the reasoning already employed with regard to the act of 1897. It results from these conclusions that the trial court committed no error in rejecting the evidence under consideration.

The matter of defense just discussed was advanced under singular circumstances. There is no pretense that the defendant informed the Elk Grove company, or that it was otherwise notified, of any claim that the mortgage was void because based upon an unlaw-

ful consideration, either before the cattle were sold or in time to have enabled the company to raise the question against the holder of the mortgage when the cattle were demanded under it. Selling property under the representation that the title is clear when in fact there is in existence a mortgage against it which is valid except for some latent defect unknown to the purchaser, and in virtue of which the property is successfully replevied from him, may be an offense in law, as it assuredly is in morals. But we have assumed that it was necessary for the state in order to convict in this case to prove the existence of a valid mortgage.

The defendant challenged the sufficiency of the information on the ground that it did not show whether the A. J. Gillespie Commission Company was a corporation or a partnership. Such an omission in laying the ownership of the stolen property in a prosecution for larceny would be fatal. (*The State v. Suppe*, 60 Kan. 566, 57 Pac. 106.) The same degree of particularity is not required, however, in the description of the mortgagee in a case of this kind.

Another objection made was that the information did not state that the mortgage was unpaid. It did allege that at the time of the sale to the Elk Grove company the cattle were encumbered by the mortgage, and this was equivalent to an allegation that the mortgage at that time remained unsatisfied. (*Keyes v. The People*, 197 Ill. 638, 64 N. E. 730.)

The information described the mortgage given by the defendant and Maris to the Gillespie company as one securing an indebtedness of \$13,386.80. The proof showed that the mortgage debt was \$13,366.80. This is claimed to be a fatal variance. It would not be profitable to review the great number of authorities cited in support of this contention. Whether or not it is possible to distinguish this case from those relied upon by the defendant, it is not necessary to do so. Notwithstanding anything that may have been said to the contrary by courts of eminent respectability, it is so

manifest that the defendant could not by the most remote possibility have been misled by the inaccurate statement of the amount for which the mortgage was given that we have no hesitancy in holding that there is nothing substantial in the objection made.

The information alleged that the mortgage had been by the mortgagee assigned and transferred to, and was then owned by, the Central Savings Bank, of St. Joseph, Mo., and Louis Hax. The evidence was that the mortgagee sold the notes under a blank indorsement, that the buyer sold them to the St. Joseph bank, delivering them without further writing, and that the bank sold one of the notes to Louis Hax, retaining the other. This is also complained of as a variance. Granting that for some purposes the description of the notes as having been assigned to, and as being owned by, the bank and Hax was inapt, this is likewise a matter by which no prejudice could result to the defendant and for which it would be folly to set aside the conviction.

The draft which the defendant (jointly with Maris) was charged with having fraudulently obtained was issued by a bank cashier to the order of John Wilson & Co., and by the payees indorsed to "Maris & Wilson, for the use of Elk Grove Land and Cattle Company." It is urged that because of this restrictive indorsement Maris and Wilson acquired no beneficial title to the draft, but took it only in trust for the Elk Grove company. This might be deemed the effect of the indorsement in the absence of any explanation, but the evidence warrants the conclusion that it was intended to mean simply that the draft, although transferred by John Wilson & Co. direct to Maris and Wilson, was delivered to them on account of the Elk Grove company.

Other assignments of error have been argued with regard to the admission of evidence, the giving and refusing of instructions, and the denying of the motion for a new trial. It is not thought that they require

separate statement or discussion. They have all been examined, and we reach the conclusion that the record is free from material error. The judgment is therefore affirmed.

All the Justices concurring.

OPINION ON REHEARING.

No. 13,737. (84 Pac. 787.)

SYLLABUS BY THE COURT.

1. **STATUTORY CONSTRUCTION—*Statute Prohibiting Combinations—Repeal by Implication.*** Chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), prohibiting combinations to prevent competition among persons engaged in buying and selling live stock, is superseded by the general anti-trust law of 1897 (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7864-7874), and is no longer in force.
2. **MONOPOLIES—*Dealing in Live Stock—Violation of Antitrust Law.*** An association of persons and corporations engaged in the business of buying and selling live stock, and practically controlling that business at the place of operation, which has a by-law forbidding its members to buy or sell live stock for others without charging a commission therefor of at least fifty cents a head, is a combination to carry out restrictions in the full and free pursuit of a lawful business, and in virtue of that fact is a trust within the terms of chapter 265 of the Laws of 1897.
3. **CONTRACTS—*Commission—Void Because Made in Violation of Law.*** The charging of a commission for services in the purchase of live stock for another, by a member of such a trust, in pursuance of the by-law referred to, is an act made a misdemeanor by that statute, and a contract to pay a commission exacted under such circumstances is void because made in violation of law.
4. ——— ***Illegal Consideration—Case Disapproved.*** A note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. The language of the second paragraph of the syllabus in *Rathbone v. Boyd*, 80 Kan. 485, 2 Pac. 664, and of the corresponding portion of the opinion, is disapproved.
5. ——— ***Consideration in Part Unlawful.*** Where two notes secured by a mortgage are given for a consideration in part

The State v. Wilson.

unlawful, although the unlawful portion of the consideration is less than either of the notes, both of the notes and the mortgage are wholly void.

6. **CRIMINAL LAW—*Obtaining Money by False Pretenses—Defense.*** In a prosecution under an information charging the obtaining of money by false pretenses through selling as clear cattle that were in fact mortgaged, it is competent for the defendant to show in defense that the mortgage relied upon by the state, although fair on its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute.

The opinion of the court was delivered by

MASON, J.: Charles L. Wilson was prosecuted and convicted upon a charge of obtaining money by false pretenses by selling cattle which he represented to be clear of encumbrance when in fact they were covered by a mortgage. At the trial, for the purpose of establishing that the mortgage in question was void, and therefore in law no mortgage at all, he offered to prove that the mortgagee was a member of the Kansas City Live-stock Exchange, that this exchange was an unlawful combination under the provisions of various statutes of Kansas known as the antitrust laws, and that the mortgage was given in pursuance of the unlawful purposes of such combination, and was therefore, by the very terms of these acts, illegal and unenforceable. The trial court rejected all evidence bearing upon this matter, and at the original hearing of the defendant's appeal the most serious question presented was whether this ruling was erroneous. Three statutes were invoked by the defendant in this connection, namely: Chapter 257 of the Laws of 1889 (Gen. Stat. 1901, §§ 2430-2438), which forbids divers enumerated agreements in restraint of trade; chapter 158 of the Laws of 1891 (Gen. Stat. 1901, §§ 2439-2441), which relates specifically to combinations of persons engaged in buying or selling live stock; and chapter 265 of the Laws of 1897 (Gen. Stat. 1901, §§ 7864-7874), which denominates associations for various purposes as

trusts, makes them unlawful, and provides direct and indirect penalties for the doing by their members of the prohibited acts.

This court upon first consideration was of the opinion that the statutes of 1891 and 1897 should be construed together. Under such construction it was held that the validity of the mortgage must be tested by the provisions of the act of 1891, because of their more specific reference to transactions of the character of that involved, and that as so tested it was not void. This view involved deciding in the negative a question which in the course of the discussion had been suggested by the state, but had not been fully argued upon either side, namely, whether the statute of 1897 was intended to cover the whole subject-matter of the act of 1891, and therefore to supersede it entirely. By reason of a very serious doubt of the correctness of the first impression of the court in this respect a rehearing was granted, and upon further consideration in the light of a full presentation of the matter the unanimous conclusion is reached that the later enactment was designed as a complete substitute for the earlier one.

The legislation of 1891 was entitled "An act prohibiting combinations to prevent competition among persons engaged in buying or selling live stock," etc. It forbade any agreement among such persons having the purpose or effect to prevent competition in the business of selling live stock for others, or to fix a minimum commission for such services. The act of 1897 makes no specific reference to agreements concerning commissions for the purchase or sale of live stock, and in the opinion announcing the decision of the case in this court it was said that the mere general expressions of the later act did not evince a purpose to replace the more definite provisions of the earlier one. However, the first subdivision of section 1 of the act of 1897 (Gen. Stat. 1901, § 7864) makes unlawful any combination "to create or carry out restrictions in trade or

commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state," and our final conclusion is that, whether or not any other provisions of this act should be construed as having that purpose, the portion quoted was intended to reach among other evils the very one denounced by the statute of 1891, for an agreement between persons engaged in buying and selling live stock for others that a minimum commission for their services shall be maintained is of necessity a restriction in commerce and in the full and free pursuit of a lawful business. Upon this ground we hold that the law of 1897 leaves no field for the operation of that of 1891, and therefore becomes a substitute for it and effects its repeal by implication.

This view is supported by two additional considerations: The act of 1897 presents a plan of handling the whole subject of trusts, and it is difficult to fit into it the provisions of the act of 1891 without marring its completeness and recognizing distinctions between essentially similar matters, such as we cannot believe the legislature intended; and, while there is no repealing clause in the law of 1897, section 11 (Gen. Stat. 1901, § 7874) provides that the act of which it is a part shall not be construed to affect any action pending under any earlier law. This saving clause, which expressly retains the vitality of the former statutes so far as concerns proceedings already begun under them, fairly implies that they are to have no further force, but are to be regarded as repealed except to the extent indicated.

The view that the law of 1897 is complete in itself, and does not require to be interpreted in connection with that of 1891, reopens the entire question whether the defendant should have been permitted to give in evidence the circumstances under which the mortgage referred to was made. He offered, among other things, to prove that it was given to a member of the Kansas City Live-stock Exchange; that this exchange was an

association of persons engaged in buying and selling live stock for others, and practically controlling that business at Kansas City; that a by-law of such association forbade its members to charge a less commission for such services than fifty cents a head; that a part of the consideration of the two notes to secure which the mortgage was given was a charge of \$201 for the services of the mortgagee in purchasing for the mortgagor the 402 head of cattle covered by the mortgage; that this commission was fixed and exacted in pursuance of the by-law already mentioned. Would these facts, if proved, render the mortgage void? It follows from what has already been said that they would show that the Kansas City Live-stock Exchange was a trust within the terms of the statute of 1897. Section 1 of that statute reads:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"*First*, To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

"*Second*, To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

"*Third*, To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"*Fourth*, To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

"*Fifth*, To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree

The State v. Wilson.

in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

"And any such combinations are hereby declared to be against public policy, unlawful and void." (Laws 1897, ch. 265, § 1; Gen. Stat. 1901, § 7864.)

It is needless to determine in this connection the effect of any of the subdivisions of the section except the first, for that is sufficient for the present purpose. The business of buying and selling cattle is one permitted by the laws of this state. An agreement among the members of an association which practically controls this business at a great commercial center that they will make no purchases or sales for others without charging as a commission for their services at least fifty cents for each head of cattle handled obviously creates a restriction in the full and free pursuit of that business. It also seemingly creates a restriction in commerce, although *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, are cited as holding against this. These cases, however, merely decide that agreements such as that referred to are not in direct restraint of interstate commerce, as such.

Was the mortgage void if it was made to a member of a trust under the circumstances claimed by the defendant? The question is rendered one of great importance by reason of the possible far-reaching consequences of an affirmative answer. It, together with related questions, has been argued at length, not only by counsel for the parties to this action but also by

attorneys appearing as *amici curiæ*, presumably in behalf of clients whose interests may be affected by the conclusion reached. Since the motion for a rehearing was granted requests for extensions of time for presentation of the matter have been repeatedly granted, in order that the fullest opportunity for discussion might be given. The parts of the statute especially relied upon by the defendant in this connection read:

"SEC. 5. Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act, within this state, are hereby denied the right, and are hereby prohibited from doing any business within this state. . . .

"SEC. 6. Each and every person, company or corporation, their officers, agents, representatives or consignees, who, either directly or indirectly, violate any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned not less than thirty days nor more than six months. . . .

"SEC. 7. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state, and when any civil action shall be commenced in any court of this state, it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act." (Laws 1897, ch. 265; Gen. Stat. 1901, §§ 7868-7870.)

They who contend that the mortgage in question would be valid notwithstanding this statute, although executed under the circumstances stated by the defendant, rely upon the cases of *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, *Ice Co. v. Wylie*, 65 Kan. 104, 68 Pac. 1086, and *The State v. Jack*, 69 Kan. 387, 76 Pac. 911.

The State v. Wilson.

These cases, however, proceed upon the theory that a wrong-doer is not to be deprived of his right to maintain an action in court merely because he has violated the law in some matter having no relation to the subject of the litigation. This principle forbids the enforcement of the literal terms of the section last quoted, but leaves an abundant field for their operation as reasonably construed. As was said in the case last cited :

“The provisions of section 7 [Gen. Stat. 1901, § 7870] that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, as held in *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, under a very similar provision of the antitrust act of 1889 (Laws 1889, ch. 257), contemplates only civil actions relating to, and growing out of, transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted, the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry.” (Page 399.)

The contention here made is that the mortgage was void, not because it was given to one who was a member of an unlawful combination, but because a part of its consideration—the charge made for commission—was itself illegal. This is not an instance of an attempt to fasten a disability to sue upon an individual because of his violation of the law in some independent or collateral matter; the objection goes to the contract itself. The statute forbids a member of a trust to do any business in the state—that is to say, as properly interpreted, to do any business in promotion of, or in pursuance of, the purposes of the trust. Assuming the facts to be as alleged by the defendant, the mortgagee, a member of the trust, bought these cattle for him, and in pursuance of the obnoxious by-law made him a charge of fifty cents a head for such service. This was an illegal act, and the contract to pay such

The State v. Wilson.

commission was a contract to pay a sum exacted in defiance of the law. The contract for this payment was, therefore, a contract in violation of the statute, by the very terms of which such contracts are made not merely non-enforceable, but absolutely void. (9 Cyc. 475.)

A part of the consideration of the mortgage was therefore illegal, if the facts were as the defendant attempted to show. Would this render the mortgage itself void? The generally accepted rule is that if any part of a single consideration or either of two separate considerations of a contract is illegal the entire contract is void, although where two promises, one of which is illegal, are made upon a lawful consideration, the promise which is unobjectionable is ordinarily held to be enforceable. (See 9 Cyc. 564-566, where the cases bearing upon the matter are collected and classified by states.) It is true that there are cases arising upon contracts based in part upon a legal, and in part upon an illegal, consideration where the courts have permitted an enforcement to the extent of the good consideration. But for the most part such cases purport to follow the general rule as above stated, but reach a result at variance therewith by failing to distinguish between a consideration which is merely insufficient to support a promise and one which is actually against the law or contrary to good morals. Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration and permit a *pro tanto* recovery. But where one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction, and the contract itself is void. According to the great weight of authority, and as we think also according to the better reason, this doctrine

is applicable where a note or series of notes is given for a consideration a specific and ascertained amount of which is illegal—for example, for an indebtedness composed of various items, some lawful and some unlawful. A typical and often-cited case is that of *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664, where an action was brought upon a note given in settlement of an account which included various separate charges made for intoxicating liquor sold in violation of law. In the opinion it was said:

“The concurrent doctrine of the text-books on the law of contracts is that if one of two considerations of a promise be *void* merely, the other will support the promise; but that if one of two considerations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the *whole consideration* is the basis of the *whole promise*. The parts are inseparable. [Citing text-writers.] Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said with much force that, where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. . . . The suit was upon a promissory note alone—upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of

the provisions of a highly penal statute. The contract evidenced by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

"With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note, for, being utterly void, it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: 'It is but a reasonable punishment for including with his just due that which he had no right to take.' " (Pages 435, 437.)

So in the case of *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 669:

"The doctrine of the common law, as it is laid down in the text-books, and supported by numerous adjudications, is that 'if any part of the entire consideration for a promise, or any part of an entire promise, is illegal, whether by statute or at common law, the whole contract is void. Indeed, the courts go far in refusing to found any rights upon wrong-doing.' [Citing authorities.] . . . There has not, perhaps, been more frequent application of the doctrine than to promissory notes, or other evidences of debt, taken in settlement of accounts for goods, wares, or merchandise, items of which were for goods sold on Sunday, or for spirituous liquors sold in violation of law. The accounts may have contained items having no connection with the illegal sales; items for goods not sold on Sunday, or items for the sales of goods not prohibited. When all are blended, and a promissory note is taken for the whole, the note is entire and indivisible, and upon it there can be no recovery. . . . The complaint declares on eight several promissory notes, and the uncontroverted fact is that these notes were given in settlement of an account for goods and merchandise

The State v. Wilson.

sold by the plaintiffs to the defendant. And there was evidence tending to show that some of the sales were made on Sunday, and some were of ginseng cordial, an intoxicating drink, in violation of a law prevailing in the locality of the sale, rendering such sale an indictable offense. If there were items of the account closed by the notes not tainted with illegality—unconnected with the illegal sale—the plaintiffs could have maintained an action on the original contracts of sale, though the notes had been taken. The notes, if tainted with illegality, are utterly void; incapable of discharging the just indebtedness of the defendant.” (Page 670.)

To the same effect are: *Hanauer v. Doane*, 79 U. S. 342, 20 L. Ed. 439; *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348; *Bick v. Seal*, 45 Mo. App. 475; *Cotten v. McKenzie*, 57 Miss. 418; *Carleton v. Woods*, 28 N. H. 290; *Snyder v. Willey*, 33 Mich. 483; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592. This application of the doctrine is almost universally upheld by the text-writers. For instance, in volume 1 of *Daniel on Negotiable Instruments*, fifth edition, section 204, the author says:

“When the defense is founded on illegality of consideration it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity—that a partial illegality vitiates the bill or note *in toto*, while the partial want or failure of consideration only vitiates it *pro tanto*. And a mortgage to secure a bill or note of which the consideration is in part illegal is also wholly void. The reason of the distinction is based mainly upon the ground of public policy, the court not undertaking to unravel a web of fraud for the benefit of the party who has woven it. If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent, though not upon the bill or note.”

(See, also, 1 *Parsons, Cont.*, 9th ed., 456; *Chitty, Cont.*, 10th Am. ed., 730; *Jones, Chat. Mort.*, 4th ed., § 350; *Pollock's Prin. of Cont.*, 1st Am. ed., 318; *Anson, Cont.*, 2d Am. ed., 252; 1 *Edwards, Bills, Notes & Neg.*

The State v. Wilson.

Inst., 3d ed., § 471; Bishop, Cont. § 74; 2 Beach, Modern Law of Cont. § 1422; Benj. Prin. of Cont. 27; Comyn, Cont., 3d Am. ed., 20; Metcalf, Cont. 247; MacLaren, Bills, Notes & Cheques, 2d ed., 185; Story, Prom. Notes, 5th ed., § 190; Wood's Byles, Bills & Notes, 146; 1 Story, Cont., 5th ed., § 583; 1 Page, Cont. 777; Lawson, Cont., 2d ed., § 335; 2 Addison, Cont., 8th ed., with American notes, 1169, note; Clark, Cont. 471; 4 A. & E. Encycl. of L. 192; 17 A. & E. Encycl. of L. 308.)

The second paragraph of the syllabus in *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664, seemingly does not accord with the general rule already stated. It reads:

"Where a chattel mortgage is made to secure, in part, a valid debt, and, in part, money advanced upon an illegal contract, the chattel mortgage may be enforced to the extent of the valid debt, although void as to the residue."

This portion of the syllabus and the corresponding part of the opinion may not have been essential to the determination of the case, but whether this be so or not we cannot accept the view there expressed as controlling upon the matter now under consideration, for the reason that it was announced without discussion and seemingly without examination of the consequences attached by the courts to a partial illegality of consideration, as distinguished from mere insufficiency. In a later case, *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11, while the precise point was not directly involved, the court quoted with approval a statement of the general doctrine taken from *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664, which is included in the quotation already made from that case. (See, also, *Gerlach v. Skinner*, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614.)

There are cases holding that where a mortgage is given to secure two separate debts, one only of which is unlawful, the mortgage may be enforced to the extent of the valid indebtedness. In *Shaw v. Carpenter*,

54 Vt. 155, 41 Am. Rep. 837, although the court professed to approve and follow *Carleton v. Woods*, 28 N. H. 290, a mortgage given to secure several notes a part of the consideration of which was illegal was permitted to be enforced to the extent of the valid consideration, upon the theory that equity was thereby done. In a dissenting opinion these cases were reviewed, and it was pointed out that even if a mortgage securing two notes, one good and one unlawful, may have vitality as to the valid note, yet where the notes themselves are void because tainted with an illegal consideration the mortgage can have no efficacy whatever. The distinction is obviously sound, and even though the correctness of the conclusion in *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664, were conceded it would not give force to the mortgage in the present case, for the two notes secured by it are equally affected by the illegality of consideration, and if the notes are void the mortgage is necessarily so.

The supreme court of Indiana, in *Hynds v. Hays*, 25 Ind. 31, repudiated the generally accepted doctrine in an opinion which presents a plausible and complete argument in favor of the position taken, based upon the view that a note given for two distinct considerations is to be treated as a severable contract. We cannot, however, regard it as affording sufficient ground for departing from a rule so reasonable in itself and so firmly entrenched in the authorities.

The case of *Carradine v. Wilson*, 61 Miss. 573, is one which supports the validity of the mortgage, but upon a different theory. It was there held that where two notes were given for a consideration a part of which was illegal, each note being for a greater amount than the illegal portion of the consideration, and a mortgage was given securing both notes, the unlawful consideration could be referred to one of the notes, rendering it void, but thereby purging the other note of the illegality and leaving the mortgage as a valid security for the second note. The facts of the present case are sub-

The State v. Wilson.

stantially the same. The illegal consideration was but \$201. Two notes were given, respectively for \$6000 and \$7366.80. We cannot agree, however, that there is any doctrine of law or reason that would justify considering the commission charge as having entered as an entirety into one note and none of it as having been incorporated in the other. There was in fact but one transaction. The Mississippi court bases its view largely upon *Zundt v. Roberts*, 5 S. & R. (Pa.) 139, and *Warren v. Chapman*, 105 Mass. 87. The former case is at variance with the prevailing view, and has done much to promote such conflict as there is in the decisions. The latter holds that, where one owes two debts, one legal and one illegal, and gives his creditor a note for an amount less than the valid part of his obligation, with no express direction as to its application, the law will apply it to the good and not to the bad account, and treat it as supported by a valid consideration. This is an entirely reasonable proposition, but it has no tendency to support the conclusion reached in *Carradine v. Wilson*, 61 Miss. 573. It results from what has been said that the view of this court is that upon the facts as the defendant sought to develop them the mortgage given by him was void.

Some attack has been made upon the constitutionality of the antitrust statute of 1897, but we think the questions so suggested are set at rest by the decisions of this court and of the federal supreme court. (*The State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; *Smiley v. Kansas*, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546.)

Was it competent for the defendant to show that the mortgage was in fact void for the reason suggested, although the invalidity did not appear on the face of the instrument? The notes were non-negotiable, so that the question is not affected by any considerations of the possible rights of an innocent purchaser. There was evidence that the complaining witness, who bought the cattle from the defendant, was required to pay the

mortgage, not being advised of any fault in its origin. There is an obvious incongruity under the circumstances in permitting the defendant to escape punishment by showing that his representations that the cattle were clear were in fact true because the mortgage upon them was void under the antitrust law, although fair and legal on its face. The wrong and fraud practiced upon the complainant are not mitigated by the existence of this concealed defense to the mortgage. Yet the criminal law can only be administered in accordance with fixed and unyielding rules. And no principle of criminal law is better settled than that in order to sustain a prosecution for obtaining property by false pretenses the pretenses must be shown to have been false. It is not enough even that the defendant believed them to be false; there can be no conviction unless they were false in fact. (19 Cyc. 394.) The allegation in an information that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage. (*Satchell v. The State*, 1 Tex. App. 438; *State v. Asher*, 50 Ark. 427, 8 S. W. 177; *State v. Garriss*, 98 N. C. 733, 4 S. E. 633; *Keller v. The State*, 51 Ind. 111.) If, for instance, the mortgage had been paid, there is no doubt that the establishment of this fact would require an acquittal, although the notes and mortgage were outstanding, uncanceled and unreleased, and although the purchaser might have been inconvenienced thereby.

The information in this case charged in set terms that the mortgage in question constituted a valid lien on the cattle. But even in the absence of an express averment of its validity the mortgage referred to must have been understood to be a valid and not a void one. It is possible that if this defense had been anticipated a good information might have been framed by charging the defendant with selling cattle under the representation that he had signed no instrument purporting

Railway Co. v. Wade.

to encumber them by which a colorable claim of lien upon them might be asserted, whereas in truth he had executed what appeared to be a good mortgage upon them, which fact caused them to be less valuable to the purchaser than they would otherwise have been, and that by reason of this apparent lien the purchaser, not being advised of any defect in the mortgage, was required to pay the amount or lose the cattle. Under such allegations a conviction might perhaps have been sustained irrespective of the legal sufficiency of the mortgage.

The judgment of conviction is reversed, and a new trial ordered.

All the Justices concurring.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
V. FRANK M. WADE.

No. 14,382. (85 Pac. 415.)

SYLLABUS BY THE COURT.

1. **DAMAGES**—*Personal Injuries—Verdict Not Excessive.* In an action for personal injuries, where there was testimony which would warrant the allowance of damages for physical pain, mental anguish, loss of time, and permanent injury, and in their general verdict the jury allowed a sum not unreasonable or excessive if applied to all the elements of damages shown by the testimony, and in answer to special questions submitted by the defendant, in which their attention was not directed to any of these elements of damages except mental pain and anguish, stated that the entire sum was allowed for mental pain and anguish caused by the injury, the court cannot say that the failure to allow anything for the other elements of damages is an indication that the jury were influenced by passion or prejudice, or that the sum allowed is excessive.
2. **ATTORNEYS**—*Argument to Jury.* Certain remarks of counsel in argument before the jury considered and held to have been proper.

Error from Cherokee district court; WILLIAM B. GLASSE, judge. Opinion filed April 7, 1906. Affirmed.

John Madden, W. W. Brown, and R. W. Blue, for plaintiff in error.

Charles Stephens, and Skidmore & Walker, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: Frank M. Wade was employed, in June, 1901, in unloading a car of lumber standing upon a side-track of the plaintiff in error at Mineral, in Cherokee county. His duty was to pass the lumber out of the car to a person on the outside, who loaded it upon a wagon. Plaintiff in error was switching cars back and forth on the side-track, and backed some cars against the one in which Wade was thus engaged. The force of the contact shifted the lumber in the car, and his ankle was caught and the injury for which he brought this action occasioned. He recovered a verdict and judgment for \$1250, to reverse which the railway company brings this proceeding in error.

There is in the case no question of the liability of the plaintiff in error for whatever damages defendant in error sustained. There are but two errors relied upon. The first is with respect to the amount of the damages. It is claimed the amount is excessive. The testimony of several physicians showed that defendant in error sustained what is known as a green-stick fracture of the tibia. One of the physicians had made an examination of the fracture in the winter following the accident, by means of an X-ray instrument, and had found evidences of an injury which he described as an indentation or depression on the tibia, with the surrounding flesh and nerves tender. He regarded the injury as permanent. Several witnesses, among whom were physicians, testified to the fact that at various times they had heard defendant in error give exclamations of then existing pain and suffering. This is com-

Railway Co. v. Wade.

plained of, but under several rulings of this court such testimony was competent. (*A. T. & S. F. Rld. Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609; *Railroad Co. v. Burrows*, 62 Kan. 89, 98, 61 Pac. 439.)

The testimony tended to show that for two years defendant in error had lost considerable time by reason of the injury; that he had suffered much pain—physical and mental; and that the injury was permanent in its character. Plaintiff in error submitted certain special questions to the jury, and the principal contention here is that the damages allowed are excessive for the reason that it is evident from the answers to these special questions that the jury allowed nothing at all for loss of time, medical attendance, or permanent injury, and allowed the entire amount of the verdict for mental suffering and anguish. Plaintiff in error submitted a number of special questions, but was careful to ask only the following, with respect to the damages sustained:

“(5) Ques. If you find for the plaintiff, what, if anything, do you find and assess his damages for mental suffering and anguish by reason of the injury which plaintiff claims was inflicted? Ans. Twelve hundred fifty dollars.

“(6) Q. If you find for the plaintiff, what, if anything, do you find and assess for doctors’ bills or compensation for physicians and surgeons for service to plaintiff, by reason of the injuries claimed to have been received? A. Nothing.”

It is conceded that it is well settled in this state that damages may be recovered for mental suffering or anguish of mind resulting from physical pain and suffering arising from the injury. (*Railroad Co. v. Chance*, 57 Kan. 40, 47, 45 Pac. 60, and cases cited.) It is clear that the jury allowed for this element of damages the sum of \$1250. The contention is that because the jury allowed nothing for permanent injury, or for loss of time, or for doctors’ bills, there is, therefore, a want of any foundation or basis for the allowance of damages for mental suffering. But before this

Railway Co. v. Wade.

court would be justified in setting aside a verdict as excessive it must appear from the amount allowed, or from some other fact or circumstance in the record, that the damages were given as the result of passion or prejudice. (*Railway Co. v. Frazier*, 66 Kan. 422, 427, 71 Pac. 831.)

Conceding for the purpose of the argument that the amount allowed for mental suffering was excessive, this alone is not sufficient to warrant the granting of a new trial. (*M. K. & T. Rly. Co. v. Weaver*, 16 Kan. 456; *U. P. Rly. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Railway Co. v. Frazier*, *supra*.) There is nothing in these answers, however, to indicate passion or prejudice of the jury. The amount allowed for mental pain and suffering seems large only by reference to the omission to allow any damages for loss of time, physical suffering, and permanent injuries. The evidence, however, would have supported a verdict for a reasonable amount for all of these additional elements of damages, which plaintiff undoubtedly suffered by reason of the injuries. The answer to the sixth question is supported by the evidence, for plaintiff's testimony shows that he had never paid anything for doctors' bills. But there is evidence of substantial elements of damages for which the jury apparently allowed nothing, perhaps because their attention was not directed to these other elements by the two questions asked. Is plaintiff in error in a position to take advantage of this somewhat technical oversight on the part of the jury? We think not. If the jury had allowed substantial damages for loss of time, for physical pain, for permanent injury, and, in addition, had allowed \$1250 for mental pain, it might have shown such passion and prejudice as would warrant the setting aside of the verdict; but we cannot say that, because of the absence of an allowance for substantial damages which were clearly established, the amount allowed is so excessive that it appears to have been given under the influence of passion and prejudice. The failure of the jury to

allow damages for the other matters, when they might well have done so, is something which, instead of being prejudicial, may have been beneficial to the plaintiff in error; at least it is no indication of passion or prejudice.

Finally, it is complained that one of the counsel for defendant in error was guilty of misconduct in his argument to the jury. Plaintiff in error submitted three special questions to the jury with reference to whether the defendant in error remained in the car while it was being moved by the switching crew. It is claimed that it became important for the defendant in error to establish by the findings that he was not in the car at this time. It is said that Judge Skidmore argued to the jury that they must make their special findings harmonize with their general verdict; and it is contended that, as this court has held it to be error for the court to instruct the jury that their answers to special questions submitted should be consistent with their general verdict, therefore this argument of counsel was objectionable for the same reason. (*Brick Co. v. Zimmerman*, 61 Kan. 750, 60 Pac. 1064.) The record does not support the contention of the plaintiff in error in this respect. The incident is brought upon the record by the affidavit of R. W. Blue, counsel for plaintiff in error, filed in support of the motion for a new trial. The affidavit does not state that counsel argued that the jury must make their special findings consistent with their general verdict. It states the language of Judge Skidmore, as follows: "That if the jury answered the said special questions 'yes,' then their verdict must be for the defendant." In our opinion this was legitimate argument, as well as a fair statement of the law. The judgment is affirmed.

All the Justices concurring.

R. B. CROAN V. HENRY BADEN.

No. 14,399. (85 Pac. 582.)

SYLLABUS BY THE COURT.

1. JURY AND JURORS—*Special Finding Construed.* Whether the answer "do not know" to a special question submitted to a jury is equivalent to "yes," or "no," depends upon the form of the question answered. Generally such an answer shows that the party whose duty it was to establish the fact involved in the question has failed in his proof. In a case where it was the duty of the defendant to prove that Emma M. Carey did not sign a certain promissory note, and the jury, in answer to the question, "Did Emma M. Carey sign the note in question?" returned the answer "do not know," such answer was equivalent to "yes."
2. LIMITATION OF ACTIONS—*Statute as a Defense—Waiver.* The statute of limitations, to be available as a defense, must be affirmatively pleaded or otherwise asserted, and a failure to do so constitutes a waiver of such defense.
3. ——— *Conflict of Laws—When Foreign Law May Apply.* The laws of the state of Kansas relating to the limitation of actions apply exclusively in this state, except when the requirements of the statute permitting the law of another state or territory to be applied have been complied with.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 7, 1906. Affirmed.

Ayres & Welch, for plaintiff in error.

J. H. Keith, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced in the court of Coffeyville, Montgomery county, Kansas, on the 29th day of August, 1900, by Henry Baden, a resident of that county, against R. B. Croan, a resident of the Indian Territory. The plaintiff recovered judgment May 11, 1901. The defendant took the case to the district court by petition in error, where the judgment was affirmed, and he now brings the case here for review.

Croan v. Baden.

The action was brought to recover on a promissory note. The petition was in ordinary form, with a copy of the note attached as an exhibit. The note reads:

"\$735.

"NOWATA, I. T., June 7, 1895.

"Sixty days after date we promise to pay to the order of Henry Baden, at Independence, Kan., seven hundred and thirty-five and no-100 dollars, with interest at the rate of ten per cent. per annum from date until paid; value received. Interest payable annually.

EMMA M. CAREY.

WM. V. CAREY.

R. B. CROAN."

Apparently for the purpose of avoiding the statute of limitations it was averred "that the said defendants, and each of them, have for more than one year since said note became due and payable resided in the Indian Territory, and out of the state of Kansas, and beyond the jurisdiction of this court."

The defendant was summoned in Montgomery county. He filed a verified answer, alleging: (1) A general denial; (2) that he had for more than eight years been a resident of the Indian Territory, and never had been a resident of Kansas; that the note was made, executed and delivered in the Indian Territory, and was barred by the laws of that place long before this action was commenced; (3) a failure of consideration.

The plaintiff for reply filed a general denial. The issues thus presented were tried to a jury of six men in the court of Coffeyville.

One of the material facts involved in the defendant's third defense was whether or not Emma M. Carey signed the note in question. The defendant claimed that he signed the note as surety, in consideration of the promise that she would also sign it; and that her name had been forged thereto. Special questions were submitted to, and answered by, the jury, which were in part as follow:

"Ques. State what the consideration [of the note] was? Ans. The amount of note.

—

Croan v. Baden.

"Q. What was the agreed consideration at the time the note was given? A. \$735.

"Q. Did Emma M. Carey sign the note in question? A. Do not know."

It is claimed that the answer "do not know" is equivalent to "no," and the case of *Kalina v. Railroad Co.*, 69 Kan. 172, 76 Pac. 438, is cited as authority for this contention. The decision, however, does not so hold. The rule established by that and other cases is that such an answer indicates that the party whose duty it was to establish the fact involved in the question has failed in his proof. Tested by this rule the answer under consideration means "yes." The defendant alleged and undertook to prove that Emma M. Carey did not sign the note. The jury, after hearing all the evidence on the subject, were unable to say that she did not sign it, and therefore the presumption that she did is not overthrown. The execution of the note by the defendant is not controverted by the evidence.

This disposes of all the questions presented in favor of the plaintiff, Henry Baden, except the one relating to the statute of limitations. It is argued by the plaintiff in error that when it appears from the face of the petition that the cause of action is barred by the statute of limitations the plaintiff cannot recover, unless he affirmatively removes the bar by his testimony. It is further claimed that this duty of the plaintiff does not depend upon any act or plea on the part of the defendant. We think otherwise. The mere fact that a promissory note is barred by the statute of limitations does not imply that the debt evidenced thereby is extinguished, nor that the defendant is not morally obligated to pay it. This statute was not designed to prevent the payment of such obligations. It only furnishes a defense thereto which the defendant may use or not at his option. The right to use this defense is regarded as a privilege which may be waived, and the failure

affirmatively to assert it will constitute a waiver thereof.

In this case the defendant did not demur to the petition, object to the introduction of evidence, plead the statute of limitations in his answer, or otherwise claim the protection of the Kansas statute. It seems that the defendant did not rely upon the Kansas statute of limitations at the trial, but sought protection under the statutes of the Indian Territory, which were fully pleaded in his answer and established by the proof. He insists that a good defense was made out under section 4450 of the General Statutes of 1901, which so far as necessary reads:

"Where the cause of action has arisen in another state or country, between non-residents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state."

The defense as pleaded, however, omits the essential averment that the cause of action arose "between non-residents of this state." This omission makes the plea insufficient. It was shown by the evidence that the plaintiff, Henry Baden, payee of the note, was at all times a resident of the state of Kansas. This fact is not disputed. It seems, therefore, that this defense, both in plea and proof, falls outside of the provisions of the statute relied upon.

We conclude that the verdict and findings of the jury were fully justified, both by the law and the evidence. The judgment is affirmed.

All the Justices concurring.

S. A. HONCE *et al.* v. CHARLES SCHRAM *et al.*

No. 14,408. (85 Pac. 535.)

SYLLABUS BY THE COURT.

1. PROCEEDING IN AID OF EXECUTION—*Action of Probate Court—Review by District Court.* In a proceeding in aid of execution the probate judge acts as a subordinate officer of the district court from which the execution is issued, and in the supervision of the probate judge's action the court exercises original, rather than appellate, jurisdiction.
2. ——— *Method of Invoking Jurisdiction of District Court.* Where such supervision was invoked by what was termed a "petition in error," and the court gave such consideration to the proceedings of the probate judge as would have been given on a formal application, it cannot be held that its action was void or that any one was prejudiced by the informality.
3. ——— *Basis for the Proceeding.* An abstract of a judgment of a justice of the peace duly filed in the district court is a sufficient basis for a proceeding in aid of execution.
4. JUDGMENTS—*Payment by a Surety—Subrogation—Contribution.* Under section 480 of the civil code (Gen. Stat. 1901, § 4926) a surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against other sureties jointly liable with him on the judgment.
5. ——— *Assignment to a Surety—Satisfaction.* The payment of such judgment by one of the sureties against whom it was rendered, and the taking of an assignment of the judgment to himself, did not operate as a satisfaction of the judgment against the other judgment debtors.
6. PROCEEDING IN AID OF EXECUTION—*Rights of Third Parties to Ownership of Assets.* While the rights of third parties as to the ownership of assets sought to be subjected to the payment of a judgment cannot be finally determined in this summary proceeding, the mere fact that property is in the hands of others than the judgment debtor, or that a colorable dispute as to the ownership arises, does not deprive the judge of power to proceed.
7. ——— *Res Judicata—One Not a Party.* A third person who is subpoenaed as a witness and gives testimony in such a proceeding, but who is not made a party to it, and who does not intervene to claim the property, is not bound by the order

Honice v. Schram.

of the judge, and may afterward in an appropriate action litigate his rights to such property.

8. ——— *Absence of the Judgment Debtor.* The failure of the judgment debtor to appear and give testimony in the proceeding does not preclude the examination of other witnesses, nor prevent the judge from making such order as the testimony produced will warrant.

Error from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed April 7, 1906. Affirmed.

N. A. Yeager, for plaintiffs in error.

T. A. Kramer, for defendant in error Charles Schram.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was a proceeding in aid of execution. Joseph S. Bogle gave a promissory note for borrowed money, and procured his brother, John P. Bogle, and also Charles Schram and E. H. Hutchins, to sign the note as sureties. Default was made in the payment of the note, and on May 16, 1891, judgment was obtained before a justice of the peace against the principal and the sureties. For his own protection one of the sureties, Schram, paid the judgment and took an assignment of it. An abstract of the judgment was filed in the district court, and several executions were issued without substantial results.

On October 13, 1903, Schram instituted this proceeding, and an order was issued by the probate judge requiring both of the Boggles to appear and answer concerning property of theirs which might be subject to the payment of the judgment. In that connection a subpoena *duces tecum* was issued, directed to S. A. Honce, a daughter of John P. Bogle, and to Chris Wirth, under which S. A. Honce produced a note for \$300, executed by Wirth. On the part of Schram it was claimed that this note was the property of John P. Bogle, while Mrs. Honce stated that it had been given to her by her father for services rendered. After

Honce v. Schram.

a hearing the probate judge found that the note and indebtedness were the property of John P. Bogle, and in order to cover it up and to prevent Schram from collecting a share of the judgment from him he had attempted to transfer the note and indebtedness to his daughter, Mrs. Honce, and that the transfer was without consideration and fraudulent. An order was made by the judge appointing a receiver, and directing him to take charge of and collect the note and apply the proceeds upon the Bogle judgment. The probate judge, who had obtained possession of the note under the subpoena *duces tecum*, delivered it to the receiver.

Exceptions were taken to the rulings of the probate judge, a transcript of the proceedings was made, and the matter was taken before the district court upon what is designated as a "petition in error." Schram moved to dismiss the proceeding for lack of jurisdiction in the district court, on the theory that a proceeding in error is not warranted in such cases. The district court denied the motion, reviewed the proceedings before the probate judge, and sustained his rulings. John P. Bogle died after the proceeding was begun, and the administrator of his estate, as well as his daughter, S. A. Honce, complain of the rulings of the district court. In a cross-petition in error Schram also complains of the refusal of the district court to dismiss the proceeding.

In a proceeding in aid of execution the jurisdiction of the district court to review and revise the action of the probate judge is original rather than appellate.

"While the proceedings were had before the probate judge, they were not an exercise of probate jurisdiction, nor was a record of them required to be kept in the probate court. The judge was exercising judicial functions in a case in the district court, and was in fact acting as a subordinate officer of that court, and under its supervisory control." (*Bowersock v. Adams*, 55 Kan. 681, 685, 41 Pac. 971.)

(See, also, *Young v. Ledrick*, 14 Kan. 92; *Sewing-*

machine Co. v. Wait, 24 Kan. 136; Code, § 499; Gen. Stat. 1901, § 4976.)

The proceeding, being in the district court, was of course subject to its supervision. Although irregularly brought to its attention, the court had jurisdiction to examine and, if necessary, to correct the proceedings of its subordinate officer. That jurisdiction was invoked, and a hearing had upon a full transcript of the proceedings. The consideration of the court was substantially what it would have been if it had been invoked by an ordinary application, and, that being true, the name of the paper by which its jurisdiction was invoked is not very material. The transcript presented the doings of the probate judge more fully than if the requirements of the code had been strictly followed. The code provides that "the judge shall reduce all his orders to writing, which together with a minute of his proceedings signed by himself shall be filed with the clerk of the court," etc. (Code, § 499; Gen. Stat. 1901, § 4976.) Since the court supervised the proceedings of the probate judge substantially as if there had been a formal presentation, it cannot well be said that its action was void, nor that any one suffered prejudice by reason of the informality.

On the other side, it is insisted that as a full transcript of the judgment of the justice of the peace was not filed in the district court there was no basis for the proceeding. An abstract of the judgment is sufficient. When an abstract, such as is prescribed in section 119 of the justices' code (Gen. Stat. 1901, § 5352), is filed in the district court, the judgment is subject to the same rules and has the same force within the county as though originally rendered in the district court. (*Treptow v. Buse*, 10 Kan. 170; *Rahm v. Soper*, 28 Kan. 529.) Where a judgment is to be transferred from one county to another a different rule applies, and the transcript of the journal entry of judgment is required. The distinction between such a transfer and the filing of an abstract within the county is pointed

Honce v. Schram.

out, and the reasons given therefor, in *Hubbard v. Jones*, 61 Kan. 722, 60 Pac. 743.

The contention that Schram was not entitled to the benefit of the judgment to enforce contribution from his cosurety cannot be sustained. Under section 480 of the civil code (Gen. Stat. 1901, § 4926) a surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against any one jointly liable with him on the judgment. In such a case a new proceeding would be wholly superfluous. The assignment of the judgment, when it was paid by Schram, was entered on the docket and embraced in the abstract of the judgment which was filed in the district court. The assignment did not operate as a satisfaction of the judgment as against the other judgment debtors, and under it, and the notice which the entry afforded, Schram was entitled to enforce contribution against his cosurety Bogle. (*Harris v. Frank*, 29 Kan. 200; *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; 17 Cyc. 1410.)

There is a contention that the judgment had not been kept alive and was therefore not enforceable. This is based on the discredited theory that no execution was issued on May 11, 1896. The entry on the judgment docket was that on the date named a præcipe for execution was filed and an execution issued. That execution appears to have been lost; but there is ample testimony that it was in fact issued, placed in the hands of the sheriff, and that he returned the writ unsatisfied. The oral proof of this fact is supplemented by an entry on the docket of June 2, 1896, that the execution was returned, entered, and filed, and that it was unsatisfied.

It is next contended that the judge had no power over S. A. Honce, who was only a witness, and that his order can have no binding effect upon her, or upon Wirth, who owed the impounded debt. The judge did have power to inquire whether the debt was an asset of John P. Bogle, and, that being found, to order the

Honce v. Schram.

application of it to the payment of the judgment. The note had been placed in the custody of the judge, and, so far as appears, it was surrendered without objection. If she had refused to yield possession, or had intervened as a party and claimed ownership of the note, the judge would probably have declined to proceed further until the dispute as to ownership had been settled. It is true, as contended, that an ultimate determination of a disputed ownership of property or of indebtedness cannot be made in this summary proceeding, and especially in a case where the claimant is not a party to the proceeding. However, the mere fact that an asset is in the hands of another than the judgment debtor does not preclude the application of it to the payment of the judgment. The statute provides that the judge may order the application of any property of the judgment debtor not exempt by law which is in the hands of any other person or corporation, or which may be due to the judgment debtor, upon the judgment, and may enforce the order by contempt proceedings. (Code, § 490; Gen. Stat. 1901, § 4966.) We have no statute, as do some of the states, providing that a dispute as to title or ownership ends the inquiry; and the statute would not be very effective if every dispute, colorable or otherwise, terminated the proceeding.

The statute is intended, however, to include only property of the judgment debtor, and is not operative upon the property of third persons; and a proceeding under it can never conclude the rights of third parties where there is a substantial dispute as to title or ownership by such parties. A refusal to surrender the note might have made necessary an action by the receiver of the court to obtain possession of, and collect, the note; but there was no refusal nor any intervention by Mrs. Honce. She was not a party to the proceeding, and her right to the note is not concluded by the action of the judge. She was a witness, and was brought into court by the compelling force of a subpoena, but this did not make her a party nor give her a

Honce v. Schram.

day in court. The judge in this case has found, upon what appears to be sufficient evidence, that the indebtedness of Wirth was due to Bogle, and therefore the order of application is not without support. The order, however, is not binding upon a third party like Mrs. Honce, and if there is a real dispute as to the ownership of the asset she is entitled to a trial in accordance with the regular forms of law.

The fact that John P. Bogle did not give testimony before the judge does not invalidate the order. The statute contemplates that other witnesses may be examined, and that the order of the judge shall be based upon the whole testimony submitted in the proceeding. The absence of the judgment debtor, which in this case it is said was due to his illness, does not defeat the proceeding. (*State, ex rel., v. Downing*, 40 Ore. 309, 58 Pac. 863, 66 Pac. 917.)

We think the probate judge had judicial authority to make the inquiry and order of application; that there is evidence to support his order; and that he correctly measured the liability of John P. Bogle as co-surety. The judgment is affirmed.

All the Justices concurring.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY V.
E. A. FIELDS *et al.*, as Partners, *etc.*

No. 14,410. (85 Pac. 412.)

SYLLABUS BY THE COURT.

PRACTICE, SUPREME COURT—*Order Granting a New Trial.* This court will not reverse an order of the trial court granting a new trial unless the record shows the order was clearly and manifestly in violation of some principle of law.

Error from Crawford district court; WALTER L. SIMONS, judge. Opinion filed April 7, 1906. Affirmed.

S. W. Moore, Cyrus Crane, and W. J. Watson, for plaintiff in error.

John M. Wayde, and Paul F. Coste, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: The Fields & Slaughter Company obtained a judgment against Forrester Brothers, to satisfy which they garnisheed the Kansas City Southern Railway Company. It answered that it was not indebted. Upon this answer the Fields & Slaughter Company took issue. The jury returned a verdict for the garnishee. Upon application of the plaintiffs the verdict was set aside and a new trial ordered. The garnishee prosecutes error to reverse this order.

There were no pleadings; consequently the contentions of the parties can only be ascertained from the statements made by counsel and the questions which appear to have been tried. From these it appears that the Fields & Slaughter Company claimed that Forrester Brothers were engaged in buying and shipping corn and oats; that about September 27, 1901, the latter entered into a contract with certain railroads running from Omaha and Council Bluffs and other common northern points to Kansas City, called the northern connecting lines, and the Kansas City Southern

73	375
381	396

Railway Company, for the transportation of corn and oats from Council Bluffs and other common points on these roads to Kansas City and over the Kansas City Southern to Shreveport, Ala., and other common points in the south, at a rate of sixteen and one-half cents per hundredweight; that the Kansas City Southern agreed to accept as its proportion of this rate eight cents per hundred, and to ship the corn over its line from Kansas City at the rate of eight cents per hundred; that Forrester Brothers commenced to ship the corn about the 1st of October, 1901, and continued shipping until February, 1902; that the Kansas City Southern charged eight cents per hundred until October 31, after which time it raised the rate to ten cents, and subsequently to fourteen cents; that Forrester Brothers paid this excess, amounting to about \$10,000, and therefore that the Kansas City Southern was indebted to Forrester Brothers for this excess. It was this alleged indebtedness of the Kansas City Southern to Forrester Brothers that the Fields & Slaughter Company were attempting to apply upon their judgment against Forrester Brothers.

The Kansas City Southern denied that it had ever made a contract with Forrester Brothers, or any one representing them, for the shipment of corn and oats from Kansas City to Shreveport or other common points at eight cents; but claimed that during the months of September and October, 1901, it had declared and published a rate of ten cents per hundred pounds on corn and oats from Kansas City to Shreveport, Texarkana, and other common southern points; that this rate had been filed with the interstate commerce commission at Washington, as required by the interstate commerce act, and was in force until October 31, about which time it changed its schedule and advanced the rate to fourteen cents, which rate was also published, and filed with the interstate commerce commission; that if any contract existed by which Forrester Brothers were to receive a special rate lower

Railway Co. v. Fields.

than that so declared and published, such contract would be in violation of the interstate commerce act, and void. It was also contended by the garnishee that its only agreement concerning the shipment of corn and oats coming to it over the northern connecting lines was made with one Shauffler, traffic agent for such lines, by which it agreed to divide the sum of the two local rates with the northern connecting lines on a more advantageous basis for the northern lines than its proportion of the two local rates; that no time was fixed for the expiration of this agreement for the division of the two local rates from the northern points to the southern points; that before any grain was received by the Kansas City Southern the northern lines forwarded a statement or schedule of such division of rates to the Kansas City Southern, according to which the agreement was to terminate on October 31, 1901; and that none of the alleged overcharges were made by the Kansas City Southern prior to that date.

It was also contended by the garnishee that the contract relied upon by the plaintiffs as a basis for its liability to Forrester Brothers was so indefinite and uncertain, both as to the quantity of grain to be shipped and the time within which it should be actually shipped, that it was non-enforceable; and also that the alleged contract, if made as claimed by plaintiffs, would be void for want of mutuality, in that Forrester Brothers did not agree to ship any grain over its line, and were not bound so to do. Another contention by the garnishee was that Forrester Brothers paid the rates charged without protest, complaint, or objection, and therefore that the payment was voluntary. All of these facts were passed upon by the jury, and they found for the garnishee. Upon a motion for a new trial the court was required to review all of the evidence produced on the trial tending to establish or refute these disputed facts.

We are not informed upon what grounds the court

set aside the verdict and granted a new trial. The granting of a new trial is, however, not looked upon unfavorably by the law, and is a matter so largely within the discretion of the trial court that this court has seldom found it necessary to reverse such orders. The trial court, on a motion for a new trial, is not required to determine that the party applying therefor has not had a fair trial, but if it entertains a reasonable doubt upon the question a new trial may be granted. It is the purpose of the law that every litigant shall have his right fairly and honestly adjudicated in accordance with its rules and forms, and, that no advantage may be taken, the matter of granting new trials is very largely a matter of judicial discretion. Upon an application for a new trial, where many material issues of fact have been involved and determined by the jury, the trial judge must review and weigh all the evidence passed upon by the jury, and also take into consideration everything transpiring on the trial. It may happen that incidents may take place at the trial which could not be put into a record and which would fully justify the court in granting a new trial. Such incidents cannot be made to appear to this court. For these reasons this court has not the opportunity of knowing what induced the trial court to grant the new trial, in the absence of a statement in the record.

It was said in the syllabus of the case of *City of Sedan v. Church*, 29 Kan. 190:

"The supreme court will not reverse the order of the trial court granting a new trial unless the supreme court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple and unmixed question of law, and that except for such error the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made."

The judgment is affirmed.

All the Justices concurring.

JOHN J. DINEEN V. JOHN OLSON.

No. 14,415. (85 Pac. 538.)

SYLLABUS BY THE COURT.

1. **FORCIBLE DETAINER—Evidence of Title—Proof of Right to Possession.** A justice of the peace, in an action of forcible detainer, may receive evidence of title, legal or equitable, when such evidence is necessary to determine the question of the right to possession.
2. ——— **Jurisdiction of a Justice of the Peace to Try the Cause.** It was provided in a written contract that the grantor therein would convey to the grantee certain real estate, upon payment of the purchase-price as stipulated. On the part of the grantee it was agreed that he would make such payments, or, in case of failure so to do, would surrender the possession of the premises to the grantor immediately. Afterward the grantee made such default as under the conditions of the contract terminated his right of possession. The grantor then commenced an action of forcible detainer, before a justice of the peace, to recover possession of the property. In such action it appeared by the stipulations of the parties thereto that such default had occurred. The defendant did not claim, and it did not appear that he had, any legal or equitable right in the premises. *Held*, that the justice of the peace had jurisdiction to hear and determine such action.

Error from Saline district court; **ROLLIN R. REES**, judge. Opinion filed April 7, 1906. Affirmed.

STATEMENT.

THIS is an action of forcible detainer. It was commenced before a justice of the peace, and the plaintiff recovered judgment. The defendant appealed to the district court, where the plaintiff again recovered judgment, and the defendant brings the case here for review. The case was tried each time upon the following agreed statement of facts:

"(1) That John J. Dineen went into possession of the southeast quarter of section five (5), township sixteen (16), range five (5), Saline county, Kansas, April 14, 1900, under contract with the Union Pacific Land Company, the owner of said land. A copy of said con-

Dineen v. Olson.

tract is attached to this agreed statement, marked 'Exhibit A,' and made a part hereof.

"(2) That at the time said Dineen went into possession he made a payment of \$168, as shown by the contract above referred to, and that on April 19, 1901, he made the interest payment of \$90.72, which was due on April 14, 1901; that after April 19, 1901, Dineen made no further payment of either principal or interest.

"(3) That demand was made of Dineen by the Union Pacific Land Company for the payments which fell due April 14, 1902, and April 14, 1903, but the same were never made or tendered, nor did the Union Pacific Land Company waive any of the conditions of the contract regarding payment.

"(4) That on January 21, 1904, forfeiture notice was duly served on Dineen; a copy of said notice with copy of the affidavit of service is attached to this agreed statement, marked 'Exhibit B,' and made a part hereof.

"(5) March 14, 1904, John Olson bought this land, under contract with the Union Pacific Land Company, for \$2000, paying \$200 down. A copy of said contract is attached to this agreed statement of facts, marked 'Exhibit C,' and made a part hereof.

"(6) Dineen refuses to deliver possession of said land to Olson, and has put in a crop on said land since the sale of the land to Olson and demand by Olson of Dineen for possession of the same.

"(7) On May 2, 1904, Olson duly served on Dineen the notice required by statute before commencing the action of forcible detention.

"(8) May 16, 1904, this action was commenced.

"(9) The amount involved is over \$100, exclusive of costs.

"(10) Additional evidence not inconsistent with the foregoing agreed statement may be introduced by either party upon the trial of the case."

The contract designated as "Exhibit A," so far as necessary to the determination of this case, is as follows:

"THIS AGREEMENT, Made this 14th day of April, A. D. 1900, between the Union Pacific Land Company, as party of the first part, and J. J. Dineen, of the county of Douglass, in the state of Nebraska, the party of the second part:

Dineen v. Olson.

"WITNESSETH, That the Union Pacific Land Company, for and in consideration of the payment to it of the sum of one hundred sixty-eight (\$168) dollars on the delivery hereof, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements of the party of the second part, hereinafter written, subject, however, to the exceptions, reservations and conditions hereinafter written, has agreed to sell to said party of the second part, for the sum of sixteen hundred eighty (\$1680) dollars, and upon the strict, exact and punctual performance, by the said party of the second part, of each, every and all of the covenants and agreements on his part herein written and by him to be kept and performed, and subject also to the exceptions, reservations and conditions below written, to make and deliver at the office of its land department, at Omaha, Neb., upon the surrender of this agreement by the said party of the second part, a good and sufficient deed with the ordinary covenants of warranty, conveying to said party of the second part in fee simple the following-described real estate, to wit: [Here follows description of land.]

"In consideration whereof, the said party of the second part has and does hereby covenant and agree to and with the party of the first part:

"First: To pay to it, at the office of the local treasurer of the Union Pacific Land Company, in Omaha, Neb., as the remainder of the purchase-price of said land, the gross sum of fifteen hundred twelve (\$1512) dollars, with interest thereon on the several dates and in the several amounts as follow:

	Day	Mo.	Year	Prin.	Int.	Amt.
First payment,	14th	April,	1901	\$90 72	\$90 72
Second payment,	14th	April,	1902	\$168	90 72	258 72
Third payment,	14th	April,	1903	168	80 64	248 64
Fourth payment,	14th	April,	1904	168	70 56	238 56
Fifth payment,	14th	April,	1905	168	60 48	228 48
Sixth payment,	14th	April,	1906	168	50 40	218 40
Seventh payment,	14th	April,	1907	168	40 32	208 32
Eighth payment,	14th	April,	1908	168	30 24	198 24
Ninth payment,	14th	April,	1909	168	20 76	188 16
Tenth payment,	14th	April,	1910	168	10 08	178 08

"Second: To pay, at the time when by law the same become due and payable, to the proper collecting officer, all taxes and assessments (special or general) which may be lawfully levied or assessed upon or against

Dineen v. Olson.

said lands (including any such taxes or assessments levied for or during the year 1900 or subsequent years).

"Third: That all improvements placed upon said premises shall remain thereon, and shall not—nor any part thereof—be removed or destroyed until final payment for said land; that he will punctually pay said sums of money above specified as each of the same becomes due.

"Fourth: That time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the covenants and agreements aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interest hereby created, or then existing, in favor of the second party, or any one claiming under him, shall utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, with all the improvements and appurtenances, shall revert to, and revest in, said first party without any declaration of forfeiture or act of reentry or any other act by said first party to be performed, and without any right of second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging. And the said party of the second part covenants and agrees that he will surrender unto the said party of the first part the said land, improvements, and appurtenances, without delay or hindrance, and no court shall relieve the party of the second part upon failure to comply strictly and literally with this contract.

"Fifth: That no assignment of this contract, or of the premises herein described, shall be valid unless the same be made with the written consent of the party of

the first part, and such consent and assignment be indorsed hereon, and that no agreements or conditions, or relations between the party of the second part and his assignee, or any other person acquiring title or interest from or through them or either of them, shall preclude the party of the first part from the right to convey the premises to the party of the second part, or his assigns, on the surrender of this agreement, and the payment of the unpaid portion of the purchase-money which may be due to the party of the first part.

"And it is further expressly agreed that any consent which may be given to the assignment of this contract, or recognition thereof by the party of the first part, shall not exempt the original purchaser from any of his liabilities under this contract, but the same shall thereafter continue in full force.

"And it is further covenanted and agreed that if said second party shall make default in the payment of principal, interest, or taxes, or shall make default in the performance of any of the covenants and agreements on his part herein specified, the said party of the second part shall then be deemed to have been from the beginning the tenant of the party of the first part, and the tenancy of said second party shall, upon the default in the performance of any of the covenants and agreements by him herein agreed to be kept and performed, cease and determine, without any notice by the party of the first part of the termination of said tenancy; and the said party of the second part hereby waives any notice of the termination of said tenancy, and agrees immediately upon such default as aforesaid to quit said premises and deliver possession of the same to said party of the first part, and that thereupon said party of the first part may treat the said party of the second part as a tenant holding over and at sufferance and may at once proceed against said second party by summary action of forcible detainer to recover possession of said premises.

"It is further mutually agreed and understood that in case of such default all payments of principal, interest and taxes and all improvements made upon said lands by the party of the second part shall be deemed and held to have been payments of rent for the use and occupation of said property during the occupancy thereof by said party of the second part as aforesaid, and that the said party of the second part shall not have relief in any court of law or equity in respect to

Dineen v. Olson.

any payments made under this contract or any improvements made upon said lands."

The contract to Olson was the same as the one to Dineen, except that he was to pay \$1800, in annual payments of \$200, and interest. The notice designated as "Exhibit B" reads:

"THE UNION PACIFIC LAND COMPANY,
OMAHA, NEB., November 28, 1903.

"To J. J. Dineen, Brookville, Kan.:

"The property hereinafter described having been sold by the Union Pacific Land Company under contract, now standing on the records of said company in the name of J. J. Dineen, to wit: Southeast quarter of section five (5), township sixteen (16) south, of range five (5) west, of the state of Kansas, contract numbered 908 'E,' April 14, 1900, you are hereby notified that default has been made by the holder of said contract, in the payment of the deferred instalments heretofore due and payable under the terms of said contract, and that he has likewise failed to perform and complete all and each of the covenants and agreements on his part to be kept and performed as in said contract specified, and that because of such default and failure to keep and perform the said covenants and agreements the said contract has become null and void, in accordance with the provisions therein contained, and all rights and interest thereby created or existing in favor of the said purchaser or any one claiming under him have utterly ceased and determined.

"You are further notified that the Union Pacific Land Company has elected to, and does hereby, declare said contract forfeited and canceled.

THE UNION PACIFIC LAND COMPANY.
By B. A. McALLASTER, *General Manager.*"

David Ritchie, and C. M. Holmquist, for plaintiff in error.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: The plaintiff in error insists that his contract with the railroad company is not a lease, but a contract for the purchase of real estate, and that

therefore the justice of the peace before whom the action was commenced did not have jurisdiction of the subject-matter involved therein. The claim in this respect is clearly and tersely stated in his brief, as follows:

"As to whether the above and foregoing contract is a contract of purchase or a contract of lease depends, as we believe, the correctness or incorrectness of the ruling of the district court in this case. It seems to us that it is clearly a contract of purchase, and not a contract of lease; and it cannot be both. It must be one or the other."

We do not deem it necessary to give this paper a name. Its provisions state the rights and duties of the parties thereunder, and present the only questions to be considered. Justice will probably be better subserved by treating this exhibit as an ordinary written contract, containing the stipulations and agreements of the parties thereto, than by attempting to assign it to a place in the technical classification of legal instruments by determining which of them it most resembles. The parties refer to this paper in their briefs as a contract, and for convenience it will be so designated here.

It is conceded that whatever right plaintiff in error may have to the possession of the land in controversy is derived from this contract. By the covenants of such contract he agreed that in case of failure on his part to comply with its provisions his right to the possession of the premises should cease at once, and all payments which had been made by him should be retained as rent for the prior use of the property. The agreed statement of facts shows that he failed to comply with his agreements in the contract on April 14, 1902, by refusing to make the payment then due. He has ever since remained in default. On January 21, 1904, he was notified that the contract was at an end. No payment or offer to pay has been made since April 14, 1901.

This action was commenced May 16, 1904. The ag-

Dineen v. Olson.

gregate amount paid by Dineen is \$258.72. He had been in possession two years at the time of default. When this action was commenced he had been in possession more than four years. The aggregate amount paid, from the time he went into possession to the date of default, if applied as rent, would be less than eighty cents an acre annually, and, for the whole period of occupancy prior to the commencement of this action, less than forty cents an acre annually. It is not claimed that an injustice will be done to Dineen by compelling him to surrender possession of the land, nor that he has any meritorious defense to a proper action brought for that purpose. It is simply insisted that he has a legal right to stay there until ousted according to the strict letter of the law.

It may be conceded that an action of forcible detainer is strictly possessory in its character, that the plaintiff must have a perfect right to possession at the time the notice to quit is given, and that when such an action is pending before a justice of the peace—a court without equitable jurisdiction or power—it must be determined as an action at law. (*Kellogg v. Lewis*, 28 Kan. 535; *Gilmore v. Asbury*, 64 Kan. 383, 67 Pac. 864.) But for the purpose of determining the right of possession, questions of title, legal or equitable, may be incidentally considered. (*Conaway v. Gore*, 27 Kan. 122; *McClain v. Jones*, 60 Kan. 639, 57 Pac. 500.) In the case of *Conaway v. Gore*, *supra*, which was an action of this nature, Mr. Justice Brewer, who delivered the opinion of the court, used the following language:

“It is true, as the court charged the jury, that questions of title are not to be litigated in actions of this nature. The question is simply one of the unlawful and forcible disturbance or withholding of possession; and yet, as we shall see hereafter, evidences of title are often properly received in evidence, and questions of title may often be considered and have an important bearing upon the final decision. Indeed, cases may arise under our statute where the plaintiff may rest his entire right of recovery upon mere proof of title.” (Page 126.)

The plaintiff may always recover in an action of forcible detainer if he is entitled to possession and the defendant has no legal or equitable interest in the land. In the case of *Douglas v. Anderson*, 28 Kan. 262, it was held that, where a tenant stipulated in a lease that upon failure to pay rent the lessor might enter and take possession, upon default the landlord might recover possession by an action of forcible detainer.

The provisions of the contract between Dineen and the railroad company contain the measure and limit of the rights acquired by him to the land therein described. By the terms of the contract he expressly agreed to quit the premises and deliver back the possession thereof in case of default by him in the performance of any of his agreements. It is admitted that he made default, and no cause or excuse is offered therefor. We can see no reason why he should not be held to this agreement. Upon the agreed facts he has no right, legal or equitable, remaining in the land, and does not claim to have. His right to possession has ended by reason of the breach of his own deliberate contract. The question whether a justice of the peace has equitable jurisdiction is immaterial, as nothing of an equitable nature is presented here to challenge such jurisdiction.

The court was clearly right in holding that under the admitted facts the right of Dineen to remain in possession was at an end. If outside of the question of possession he has rights concerning crops, improvements, or of any other nature, they can be adjusted in any appropriate proceeding without embarrassment on account of this judgment, as it is not a bar to any after-action brought by either party. (Gen. Stat. 1901, § 5396; *Waite v. Teeters*, 36 Kan. 604, 14 Pac. 146.) The judgment of the district court is affirmed.

All the Justices concurring.

Keeler v. Lauer.

ISAAC KEELER *et al.* v. C. LAUER *et al.*

No. 14,431. (85 Pac. 541.)

ISAAC KEELER *et al.* v. BENJAMIN HEILBRUN,
as Trustee, etc.

No. 14,432. (85 Pac. 541.)

JOSEPH CAUFFMAN *et al.* v. C. LAUER *et al.*

No. 14,433. (85 Pac. 541.)

SYLLABUS BY THE COURT.

1. **WILLS—Testamentary Trust—Discretion Given the Trustee—Validity.** A testamentary trust authorized the trustee, who was the husband of the testatrix, to sell the property of the estate and invest the proceeds as he might deem best, and to appropriate so much of the estate to the education and maintenance of the children of the testatrix as the trustee might deem necessary. It provided, also, that no bond should be required of the trustee, nor a report of his doings to the court, but that he should have full power to sell and dispose of the trust property as his judgment might dictate, so long as the proceeds should be applied to the purposes of the trust. *Held*, that the large discretion vested in the trustee did not invalidate the will.
2. ——— **Trustee Subject to Control of a Court of Equity.** Notwithstanding the powers and discretion given to the trustee he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust.
3. ——— **Duration of Trust—Limitation—Rule against Perpetuities.** A provision in the will that the trust is to terminate and the estate vest in the beneficiaries within twenty-one years, or within the common-law period, does not offend the rule against the creation of perpetuities.
4. ——— **Probate of Will—Contest—Limitation of Action.** An order probating a will determines its due attestation, execution, and validity, and an heir or other interested person must contest the will, if at all, within two years from the time of probate, unless such person is under legal disability.
5. ——— **Creditor of an Heir—Right to Contest.** A creditor of an heir who claims that the devised property has passed to the heir occupies no better position, at least, and has no greater right to contest the will, than the heir himself.
6. ——— **Consent to Will—Need Not be Probated.** A consent of the husband that the wife may bequeath and devise more

Keeler v. Lauer.

than one-half of her property is not to be regarded as a part of the will, and it is not necessary that it should be admitted to probate.

7. ——— *Consent May be General.* The law does not require that such consent shall specify the particular property which may be so bequeathed and devised, nor that it shall particularly designate the will to which the consent applies.

Error from Shawnee district court; Z. T. HAZEN, judge. Opinion filed April 7, 1906. Affirmed.

STATEMENT.

SEVERAL creditors of Benjamin Heilbrun caused levies of executions to be made upon real estate in which it was claimed Heilbrun had an interest, acquired by inheritance from his wife. These suits were brought to enjoin the sale of the land upon the executions, claiming that the property had passed by will of Carrie Heilbrun, in whom the title had rested, to her children. The following is a copy of the will:

"I, Carrie Heilbrun, of the county of Osage and state of Kansas, being of lawful age and of sound and disposing mind and memory, but fully realizing the uncertainty of human life, do make, publish and declare the following as my last will and testament, hereby revoking all former wills by me at any time heretofore made:

"I give, bequeath and devise all my real and personal estate of what nature or kind soever to my husband, Benjamin Heilbrun, in trust for the sole benefit, behoof and use of my children that may survive me. My said husband, Benjamin Heilbrun, is to hold all of said property as trustee only, and it is my will that in acting as such trustee he shall not be required to give bond or report his doings to any court. I hereby direct that my said trustee shall have full power to sell any real estate of which I may die seized, and invest the proceeds or any part thereof in other real estate, with like power of sale; and I hereby direct that he may sell any other property which may come into his hands in such trust capacity, with power to reinvest the proceeds or any part thereof with like power of sale.

"I hereby direct my said trustee to use and appropriate so much of the trust estate as may in his judgment be deemed necessary for the proper support, maintenance and education of my said children. It is

Keeler v. Lauer.

my will and I hereby appoint and constitute my said husband, Benjamin Heilbrun, the sole trustee and financial agent of my estate for the benefit of my children, and in so doing my intention is not to hamper his movements but to give him full authority to sell and dispose of any of the property as his judgment may dictate, so long as the proceeds are applied according to the manner heretofore set out, but no person paying money or other thing of value in its stead to my said trustee upon my said trustee's receipt shall be liable to see to the application or be answerable for the misapplication or new application of the same.

"The said trust shall continue and be in force until my youngest child shall have arrived at the age of twenty-one years, at which time my said trustee shall proceed to divide the trust estate in the manner following, that is so say: To each of my children I direct my said trustee to give, pay over and transfer an equal portion of my trust estate as it then shall be found to consist of, to each child share and share alike; and in the event any of my said children shall have died leaving issue at the time of said division of said estate, then the said issue shall take the part that his, her or their parent would have taken had they been living; it being my intention that only such of my children as shall be living at the termination of said trust, and the living issue of such of my children as may have died before that time, shall participate in the distribution of my said trust estate.

"For his services as such trustee said Benjamin Heilbrun shall be allowed such sum annually as it may require to compensate for the necessary time and labor expended in behalf of said estate.

"I hereby nominate and appoint said Benjamin Heilbrun the sole executor of this my last will, and I direct that he shall not be required to give surety on his official bond. This will is typewritten on two sheets of paper.

"In witness, I have hereunto set my hand, this 9th day of April, 1901.

CARRIE HEILBRUN.

"Signed, sealed, published and declared by said testator, Caroline Heilbrun, as and for her last will and testament, in the presence of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses, this ninth (9th) day of April, 1901.

GUSTAV WOLF.
JENNY WOLF."

Keeler v. Lauer.

The same day on which the will was made Benjamin Heilbrun executed a consent to the making of such a will. It reads:

"I, Benjamin Heilbrun, of Osage county, and the state of Kansas, of lawful age, and being of sound mind and memory, do hereby and herein consent that my wife, Carrie Heilbrun, of Osage county, state of Kansas, give, will and devise and bequeath from me, the undersigned Benjamin Heilbrun, more than one-half of all the property she may own or be entitled to, both real and personal, at the time of her demise.

"Further, I, the said Benjamin Heilbrun, do consent that my said wife may give, will and devise and bequeath all of her said property of whatsoever kind or nature to her children, or to any other person she may name, as her heirs at law, in any will she may make and publish, all to the exclusion of any and all rights I, as her said husband, have under the laws of the state of Kansas.

"In witness whereof, I have hereunto set my hand, this 9th day of April, A. D. 1901.

BENJAMIN HEILBRUN.

"Signed, sealed and delivered by said Benjamin Heilbrun as and for his consent given that his said wife, Carrie Heilbrun, may give, will, devise and bequeath her property from him, in the presence of us, who, at his request, and in his presence, and in the presence of each other, we have hereunto subscribed our names as witnesses, this 9th day of April, A. D. 1901.

BEN LAUER.

CHARLIE A. ANDERSON."

The creditors answered and attempted to contest the execution and validity of the will, claiming that Benjamin Heilbrun had an interest in the land which was subject to execution. The court found against the claims of the creditors and enjoined the sale of the land under the executions. The creditors complain.

Charles S. Briggs, W. W. Harvey, and Buck & Spencer, for plaintiffs in error; Overmyer & Overmyer, of counsel.

Thomson, Stanley & Price, McLaughlin & Messerley, and J. E. Jones, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: The title to the land sought to be subjected to the payment of the judgment against Benjamin Heilbrun was in his wife, Carrie Heilbrun, at the time of her death. While her ownership has not been exactly conceded, it is not seriously attacked. In one part of the answer there was a general statement that real and personal property of Benjamin Heilbrun was placed in his wife's name for fraudulent purposes, but there is no allegation that the property in question had ever been owned by him, nor that it was fraudulently acquired or held by her. The case must be determined on the theory that she was the owner of the land when it was devised and until her death.

It is contended that the terms of the will betray a wrongful purpose; that they are such as to render the instrument ineffective, and therefore one-half of the land passed to Benjamin Heilbrun at his wife's death. Nothing is found in the provisions of the will to avoid or discredit it. Large discretionary powers were conferred upon the trustee, it is true, but that was a matter for the testatrix, and after specifying particularly the purposes for which the estate should be devised she evidently deemed it advisable to leave the management of it to the discretion of the trustee.

One feature of the will is a provision that the trustee shall not be required to give bond or report his doings to a court. He is authorized to sell any of the real estate and invest the proceeds, and to sell and reinvest as he may deem best; to appropriate so much of the estate as he may think necessary for the support, maintenance and education of the children; and there is expressed in the will an intention not to hamper his movements, but to give him full authority to sell and dispose of the property as his judgment may dictate, so long as the proceeds are applied to the purposes of the trust, that is, for the benefit of the children, and an equal division of the estate among them when the

youngest child should arrive at the age of majority. The omission of a bond is not unusual, and the attempted waiver of a report of the trustee's doings to a court does not destroy the will. The provision evinces a purpose of relieving the trustee of making reports that an ordinary executor would be required to make.

The trust is within the scope of equity jurisdiction, and the trustee is subject to the power and direction of the court whenever there might be an occasion for its exercise. Upon complaint of the beneficiaries that the estate was being mismanaged or the trust abused they could safely appeal to the jurisdiction of the court for the protection of the estate. Neither this provision nor those vesting great discretionary power in the trustee, nor even the possibility of the abuse of the power by the trustee, furnishes any reason for declaring the trust invalid. It has been said that, "as a general rule, a court of equity will not interfere with or attempt to exercise discretionary powers conferred on trustees. But the court never loses its power to review the use of such discretion and to correct any abuse in its exercise. Moreover, equity will always so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power." (28 A. & E. Encycl. of L. 991. See, also, page 985.)

The contention that the will is void because it violates the rule against the creation of perpetuities is not good. There is no remoteness in the vesting of the estate, and it is to be noted that, instead of providing for a suspension of alienation, the will itself authorizes the trustee to sell and convey the land at any time. The trust is to terminate and the property to pass to the children when the youngest child arrives at the age of twenty-one years. Having no statute on the subject the common-law rule prevails, under which the contingent interest must become vested within a life or lives in being and twenty-one years afterward, to

which, under some circumstances, is added the period of gestation. (22 A. & E. Encycl. of L. 708; Gray, Rule against Perpetuities, 2d ed., § 201.) If the contingency on which the estate is to vest must certainly happen within the common-law period, it does not offend the rule. As the minority of the youngest child comes within the gross period added to a life in being there is no room for disagreement. It is held, too, that the term of twenty-one years may be taken in gross, without reference to infancy, and the devise is not too remote if the contingency must happen within that period. (*Barnitz's Lessee v. Robert Casey*, 11 U. S. 456, 468, 3 L. Ed. 403; *Potter v. Couch*, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Johnston's Estate, Johnston's Appeal*, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Cadell v. Palmer*, 1 Cl. & F. [Eng.] 372; *Von Brockdorff v. Malcolm*, 30 Ch. Div. 172; Gray, Rule against Perpetuities, 2d ed., §§ 186, 223; 22 A. & E. Encycl. of L. 709.)

The contingency, as we have seen, must happen within twenty-one years, and under any view the estate will vest within the common-law measure of time. The recent case of *Coleman v. Coleman*, 69 Kan. 39, 76 Pac. 439, is quite closely in point. There a will was made giving an estate to children of the testator, but providing that the real estate should not be sold until the youngest child should reach majority. In the opinion it was said:

"It is finally contended that the limitation over, and the estate sought to be conferred thereby, is void for remoteness, and created a perpetuity prohibited by law. This claim is not well founded. Three of the testator's children were living when the will was made; the other child was born prior to his death, and the fee to the proceeds of the property in question was to vest in them when the youngest child became of age." (Page 45.)

The New York cases cited are based on a statute which does not conform to the common-law rule, and hence are not controlling.

Keeler v. Lauer.

The attack of the creditors of Benjamin Heilbrun upon Mrs. Heilbrun's will is collateral in character, and somewhat in the nature of a contest. The will is not open to contest, as it was probated and its validity established more than two years before the attack was made. Then, the matter of probate being within the jurisdiction of the probate court, its judgment in the premises is not open to collateral attack. (*Calloway v. Cooley*, 50 Kan. 743, 754, 32 Pac. 372; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Watkins v. Mullen*, 62 Kan. 1, 61 Pac. 385, 84 Am. St. Rep. 372.) The order of probate determined the due attestation, execution and validity of the will, and in the absence of a contest within the appointed time it is forever binding, except as to those under legal disability. (Stat. Wills, §§ 19-21; Gen. Stat. 1901, §§ 7956-7958.)

It is contended that the will is not effective, nor the probate of it conclusive, because the consent of the husband that the wife might bequeath and devise all her property to her children was not presented to the probate court and probated. The statute does not declare that the consent is to be regarded as a part of the will, nor that it shall be probated. We cannot interpolate a clause that such consent shall be invalid unless it is proved and recorded. In the giving of consent such formalities are required as that it shall be in writing, and executed in the presence of two witnesses, and if the legislative purpose was that it should be filed, recorded, or probated, these things certainly would have been included with the other requirements.

It is contended, also, that the consent must be to a particular will, and that the one in question is ineffectual because it is general. The statute controls, and it does not provide that the consent of husband or wife shall specify the particular pieces of property which the other may will away. On the other hand, it is general in its terms, stating that the husband or wife may consent "that the other may bequeath more than one-half of his or her property from the one so

consenting." (Stat. Wills, § 35; Gen. Stat. 1901, § 7972.) In the present case, however, it appears that the will and consent bear the same date, and being contemporaneous in execution may well be considered as having been made with reference to each other.

After the death of his wife Benjamin Heilbrun went through the form of electing to take under the will. If the provision of the statute in regard to a widow's election applies to the widower, which we need not now determine, it is clear that the attempt made did not nullify or weaken the consent already given. The consent was sufficient for the purpose, and no further step was necessary. But probably it was not then within his power to revoke the consent previously given. With this consent Mrs. Heilbrun had a complete right to dispose of all her property by will. The will made is in due form, and the order probating it determined its due execution and validity.

Only interested persons can contest the will, and it may well be doubted whether the creditors of the husband can be regarded as entitled to that right. In *Lockard et al. v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63, it was held that the words "any person interested therein" include only such persons as would take an interest in the estate of the testator under or by virtue of a provision of the will, and it was there said that "judgment creditors of the husband of a testatrix have not, under the statute, . . . such an interest as gives them a right to contest the probate of the will of the testatrix, by which a child is made the sole legatee and devisee and the husband is deprived of his distributive share in the property of his wife." (Syllabus.) In Page on Wills, section 325, it is said that "the creditors of an heir of decedent cannot contest decedent's will disinheriting such heir by reason of creditor's hopes or expectations of being paid out of the heir's share of decedent's estate." (See, also, *Shepard's Estate*, *Appeal of Shepard et al.*, 170 Pa. St. 323, 32 Atl. 1040; *Cochran v. Young*, 104 Pa.

St. 333.) Even if the creditors could be substituted to the rights of Benjamin Heilbrun the time had passed in which he could have instituted a contest of the will, and in no event could his creditors have any better standing to contest than he had.

It follows from what has been said that no error was committed by the court in overruling the demurrers to the amended petitions, nor in sustaining the demurrers to several of the defenses of the answers. The evidence, including that relating to the acceptance of the trust by the trustee, abundantly sustains the judgment of the trial court, and, no error appearing in the records, the judgments in the several cases are affirmed.

All the Justices concurring.

CHARLES E. GIBSON V. WILLIAM TRISLER *et al.*

No. 14,443. (85 Pac. 413.)

SYLLABUS BY THE COURT.

1. **TAX DEED—Recorded Five Years—Presumption as to Validity.**
Where a tax deed has been filed for record more than five years before it is attacked, all presumptions are in favor of the regularity of the prior tax proceedings.
2. ——— **Omission of Statutory Recital—Supplied by Inference.**
Where the only objection made to such a deed is that a statutory recital is omitted, or insufficiently stated, the deed will not be declared void if, by giving other recitals contained therein fair and liberal constructions, it can be said that such omitted recital is fairly supplied.
3. ——— **Delinquent Taxes Not Chargeable When Certificate is Assigned Not a Lien.** Where lands have been bid off by the county treasurer for the county for delinquent taxes, the assignee of the tax-sale certificate therefor is required to pay only the amount of taxes, costs and charges which the county treasurer should have charged on the book of tax sales for unpaid taxes under the provisions of section 7654 of the General Statutes of 1901. Subsequent delinquent taxes not so chargeable at the time of the assignment are not liens upon the land within the meaning of the section.

73	397
74	115

73	397
76	776
77	163
77	247

73	397
79	104
79	842
80	361

73	397
81	71

Gibson v. Trisler.

Error from Crawford district court; WALTER L. SIMONS, judge. Opinion filed April 7, 1906. Affirmed.

Rossington & Smith, for plaintiff in error.

D. H. Woolley, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: This was an action in ejectment. The only question reserved for our determination is the validity of the tax deed relied upon by the defendants, which had been of record more than five years. If this deed is valid on its face, the judgment must be affirmed; if invalid, it must be reversed.

The deed, after showing that the taxes on the lots in question were delinquent for the year 1892, and that the lots had been advertised for sale for such delinquent taxes in September, 1893, and not having been sold were "therefore bid off by the county treasurer of said county for the sum of \$12.82," contains the following recitals:

"And whereas, for the sum of thirty-one (31) dollars and fifteen (15) cents, paid to the treasurer of said Crawford county on the 9th day of April, A. D. 1895, the county clerk of said county did assign the certificate of sale of said property and all the interest of said county in said property to Crawford & McMurray, of the county of Crawford, state of Kansas; and whereas, the subsequent taxes of the years 1893, 1894, 1895, amounting to the sum of thirty-eight (38) dollars and eighty (80) cents, have been paid by the purchasers as provided by law; and whereas, three years have elapsed since the date of said sale and the said property has not been redeemed therefrom as provided by law:

"Now, therefore, I, John Ecker, county clerk of the county aforesaid, for and in consideration of the sum of sixty-five (65) dollars and ninety-six (96) cents, taxes, costs and interest due on said land for the years 1892, 1893, 1894, and 1895, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Crawford & McMurray," etc.

The objection to the deed is stated by the plaintiff in error as follows:

"It is our contention that under a fair interpretation of these recitals, as to payments made and taxes existing on the property, it is evident that section 7649 of the General Statutes of Kansas, 1901, was not complied with. Section 7649 of the General Statutes provides that no certificate of sale shall be made to any person unless there be paid into the county treasury a sum of money equal to the cost of redemption at that time of any land or lots sold to the county; . . . that inasmuch as the land was bid off for taxes and charges in September, 1893, for \$12.82, and the certificate of sale was not assigned until April 9, 1895, the interest on this sum at the statutory rate of fifteen per cent. would require that a purchaser of the county's certificate for the taxes of 1892 pay the sum of \$15.74. It is likewise apparent that the subsequent taxes for the years 1893 and 1894, being past due and a lien on the land, must have been paid by the assignee of the tax certificate in order to entitle him to obtain a good and valid assignment."

The tax deed recites that the certificate was assigned April 9, 1895, for the sum of \$31.15. Counsel argue that this amount is less than the taxes, interest and costs then payable could possibly have been, since the taxes and charges for 1892 would at that time amount to \$15.74, which if deducted from the total amount paid would leave only \$15.41 to be applied to the delinquent taxes for the years 1893 and 1894. The error into which counsel have fallen is in presuming that the assignee of the certificate assigned on April 9, 1895, was required to pay the delinquent taxes of 1894.

It presumptively appears from the deed that the taxes for 1893 became delinquent and the lots were advertised to be sold therefor in September, 1894; and that the county treasurer charged such delinquent taxes and charges on the book of tax sales of the year in which the lots were sold to the county. Such taxes would thereupon become a lien upon the property, and the county could not legally assign the certificate until such taxes were paid. It also appears that the taxes

for 1894 were delinquent. It was the duty of the county treasurer to advertise such lots for sale for such delinquent taxes in September, 1895, and if the county still retained the certificate the county treasurer should have charged such delinquent taxes and charges on the book of tax sales of the year in which the lots were sold to the county. But in this case the tax-sale certificate was assigned April 9, 1895. Therefore the taxes of 1894 had not been and could not have been charged upon the book of tax sales until the lots had been advertised for sale, which sale could not take place until September, 1895. When the certificate was assigned the taxes for 1894, although delinquent, were not a lien upon the lots in the hands of the county by virtue of its tax certificate, and were not collectable or receivable by it under the certificate.

It is also contended by the plaintiff in error that the deed is void on its face because it does not recite that the lots were bid off by the county treasurer *for the county*. The recital is:

"Whereas, at the place aforesaid said property could not be sold for the amount of the taxes and charges thereon, and was therefore bid off by the county treasurer of said county for the sum of . . . ; and whereas, for the sum of . . . , paid to the treasurer of said Crawford county, . . . the county clerk of said county did assign the certificate of sale of said property and all the interest of said county in said property."

These recitals, considered with the provisions of the statute which require the county treasurer as such officer to bid the unsold lands off for the county (Gen. Stat. 1901, § 7646), are sufficient to supply the omission in the deed of which complaint is made. They are sufficient to satisfy us that the county treasurer was not acting for himself as an individual when he bid the lands off, but that the bid was for the county. And the additional recital that the deed was made by the county clerk of Crawford county to Crawford & McMurray, apparently in pursuance of the purchase

made by the county, leaves no room to doubt that the treasurer bid the land off for the county.

Counsel have, no doubt, been misled into making this contention by the decision of this court in *Penrose v. Cooper*, 71 Kan. 720, 81 Pac. 489, which they cite as authority. A rehearing was granted in that case, and it was subsequently held that "where a tax deed has been of record for more than five years it will not be held to be void because of the omission of express recitals required by the statute, if the substance of such omitted recitals can be supplied by inference fairly to be drawn from statements elsewhere made in the deed, by giving to the language employed a liberal interpretation to that end." (*Penrose v. Cooper*, 71 Kan. 725, 84 Pac. 115.) The recitals in the deed in this case are substantially those in the deed under consideration in *Penrose v. Cooper*.

As we discover no defects on the face of the deed the judgment is affirmed.

All the Justices concurring.

GEORGE J. CHRISTISEN V. EDWIN BARTLETT.

No. 14,488. (84 Pac. 530.)

SYLLABUS BY THE COURT.

1. JURISDICTION—*District Court—Correction of the Record.* A district court has the power to correct the entry of a judgment so as to cause it to speak the truth after the expiration of the term at which it was rendered, and upon the personal knowledge of the judge of what took place in court at the time of its rendition.
2. ——— *Notice to the Parties.* Whether or not it is competent for a district court of its own motion, upon discovering that an error has been made in the entry of a judgment, to order a correction thereof without notice to a party affected, such want of notice cannot be made the basis of a complaint in this court by one who afterward filed a motion

73	401
74	626
73	401
76	803
76	804
73	401
778	747
73	401
81	184

Christisen v. Bartlett.

asking that the entry be restored to its original form, and was given a hearing upon the merits of such motion, the decision of which was against him.

Error from Hodgeman district court; CHARLES E. LOBDELL, judge. Opinion filed April 7, 1906. Affirmed. Opinion denying a rehearing filed May 12, 1906.

Finley & Madison, for plaintiff in error.

F. Dumont Smith, for defendant in error.

The opinion of the court was delivered by

MASON, J.: Edwin Bartlett sued George J. Christisen in ejectment. A judgment was rendered for the defendant, which was immediately set aside, over his objection, upon demand of the plaintiff, by notice on the journal, the cause being then continued to the next term. A record was shortly thereafter made of these proceedings, stating that the judgment was rendered by consent of the plaintiff. The defendant then filed a petition in error in this court based upon the contention that, as the judgment had been given by consent of the plaintiff, the court had no authority to set it aside, the statute authorizing a second trial in ejectment having no application to such a case. On the first day of the next term the district court of its own motion, and without notice to the defendant, made an order reciting that the journal entry theretofore made was incomplete and in part untrue, and directing a new entry to be made in accordance with the actual facts. The journal was thereupon corrected in obedience to this order. The new entry showed in detail the circumstances under which the judgment had been rendered, and in particular recited that the plaintiff consented to its rendition only upon the condition that it should be immediately set aside upon his application. Still later the defendant filed a motion to set aside the order of correction, and gave the plaintiff notice of a hearing upon it. A hearing was had, both parties being represented, and the motion was denied. The pro-

ceedings subsequent to the judgment are brought to our notice by supplemental transcripts.

Two questions are presented—whether this court shall look to the original or to the corrected entry to learn the circumstances under which the judgment was rendered, and whether, under the facts as disclosed by whichever entry shall be held to control, it was error for the district court to set aside the judgment.

The order of correction is objected to on three grounds: (1) That it was not in accordance with the real facts, and was not supported by sufficient evidence; (2) that it was made after the expiration of the term of court at which the judgment was rendered; (3) that it was made without notice to the defendant. The first two objections are covered by the decision of this court in *Martindale v. Battey*, ante, p. 92, where it was held that the record of a judgment can be corrected so as to speak the truth after, as well as during, the term at which it was rendered, and upon any satisfactory evidence, parol as well as written, although it was noted that there have been many decisions against each of these propositions. (See, also, *Investment Co. v. Walsh*, 70 Kan. 899, 79 Pac. 688.) There was no suggestion in this case of any purpose or attempt to change the order that was actually made—the alteration was only in the language of the record, describing what had been done. No question is involved of any rights having been acquired under the original entry that would be disturbed by its change. The personal knowledge of the judge as to what had taken place in his presence was equivalent to evidence on the subject, and a decision of fact made upon that basis cannot be reviewed here. The circumstance that his attorney indorsed an approval upon a form for the original journal entry is mentioned as estopping the plaintiff from denying its correctness. It was the duty as well as the privilege of the judge, however, to see that the record was correctly kept, and no act of the parties could prevent the exercise of that function.

Christisen v. Bartlett.

That no notice was given to the defendant of the change in the record was presumably due to the fact that the change was ordered by the court of its own motion. Even in such a case, irrespective of any question of jurisdiction, the better practice would seem to be to give the parties affected notice of a proposed amendment and an opportunity to be heard upon the matter. Whether the defendant could otherwise complain of the want of notice in the present case need not be determined; he afterward, as already stated, filed a motion presenting directly the question as to what form of entry the facts required, and upon this motion a hearing was had, participated in by counsel for both parties. The court decided against the contention of the defendant. He has therefore had every advantage that would have been secured to him by a notice of the proposition to correct the record.

Accepting the corrected record as evidence of what actually took place, it is manifest that no error is shown. The judgment against the plaintiff was justified only by his consent, and his consent was expressly conditioned upon its being immediately set aside. Under these circumstances the court could not permit the judgment to stand. Fairness to the plaintiff required that it should be vacated, and as the order of vacation was made at the same term there can be no doubt of the jurisdiction of the court to make it.

The order of the district court setting aside the judgment is affirmed.

All the Justices concurring.

OPINION DENYING A PETITION FOR A REHEARING.

(85 Pac. 594.)

SYLLABUS BY THE COURT.

JURISDICTION—*District Court—Correction of the Record.* A district court has inherent power to correct the record of its proceedings so that it shall speak the truth and show what actually took place. This power is not lost by lapse of time, and may in the discretion of the court be exercised upon its own motion and without notice to the parties affected.

The opinion of the court was delivered by

MASON, J.: In the original opinion in this case it was stated that one objection made by the plaintiff in error to the order of the district court amending the record of its judgment was that the purported correction did not accord with the real facts, and was not supported by sufficient evidence. In a motion for a rehearing it is truly said that this statement is incorrect, and that the only objections made to the order were based on the contention that the district court had no jurisdiction to make it.

This court was mistaken in supposing that counsel for the plaintiff in error were relying upon a claim that the first journal entry showed the actual proceedings that took place and that the second one did not. This mistake resulted from their having filed here an affidavit tending to impeach the second entry and support the first, and from the circumstance that at the oral argument the question of fact was the subject of some controversy. This affidavit, however, was presented in resistance of the motion of the defendant in error for leave to file a supplemental transcript, and the oral discussion referred to was only incidental. Neither upon the final submission of the cause here nor in his motion in the lower court to set aside the order amending the journal entry did the plaintiff in error raise an issue as to what was actually done at the time judgment was rendered. At the hearing of that motion affidavits were offered and rejected the contents of which are not shown, but the motion itself was based on purely jurisdictional grounds. The plaintiff in error stands upon the proposition that the district court had no power after the expiration of the term at which the judgment was rendered to order a change in the record of the judgment of its own motion and without notice to him. If his contention is sound he has done nothing to waive its benefits and is entitled to a reversal of the order.

In support of his position the plaintiff in error cites a number of decisions which are quite beside the question, because they refer to actual changes in the action of the court, while we are concerned here only with an alteration in the record made of such action. He also relies upon the language of the first sentence of section 569 of the civil code (Gen. Stat. 1901, § 5055), which reads:

“The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action.”

This language has obvious reference to the third subdivision of the preceding paragraph, which by the context is shown to have relation to the vacation or modification of judgments or orders actually made, and not to the correction of mistakes made in attempting correctly to register them. Whether it has any application to the matter of rectifying errors made by the clerk in recording orders need not be decided. If so, the method pointed out for accomplishing that purpose is not exclusive. A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see that its records speak the truth is an affirmative and active one, and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion or that the other should have notice before action is taken. (See 17 Encyc. Pl. & Pr. 912, 913, and 914, note 2.) The proposition is thus stated in the syllabus to *Balch & wife v. Shaw*, 61 Mass. 282:

“Courts of record have power, at any time, as well after, as during, the term at which any entry is made, of their own motion or on the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case; and are the exclusive judges

of the necessity and propriety of so amending and extending their records, and of the proofs and of the sufficiency of the proofs on which to proceed."

In *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49, it was said, citing *Balch & wife v. Shaw*, *supra*:

"On general principles, it is competent for a court of record, and incident to its authority, to correct mistakes in its records, which do not arise from the judicial action of the court, but from the mistakes of its recording officer. In doing this, it may regulate its own action upon its own sense of responsibility and duty, and proceed upon suggestion, or on motion of those interested, or upon its own 'certain knowledge and mere motion.' It would not be an adversary proceeding, in which, of necessity, there should be parties, or in which notice would be required." (Page 235.)

In applying this principle in *Strickland v. Strickland*, 95 N. C. 471, the court said:

"The court did not enter the judgment it intended to enter, nor that authorized by what appeared in the record. Such errors may be corrected at any time, and after a long while, upon motion, or the court may and ought to correct them *ex mero motu* as soon as it sees them. This is necessary and proper, to the end the record shall speak the truth. The object is to make the record show what the court, in fact, resolved, intended, and in contemplation of law did." (Page 473.)

The further citation of authorities is unnecessary. The power referred to is undoubted, and is essential to the prevention of injustice. The manner of its exercise is necessarily committed to the sound discretion of the court, and must be governed by circumstances. Unquestionably, as suggested in the original opinion, it would ordinarily be better practice that a notice should be given. Possibly conditions might arise in which a failure to give notice would tend to show an abuse of discretion. In the present case the omission to give notice affords the plaintiff in error no cause of complaint. As already stated, a notice was not necessary to confer jurisdiction to make the order, and it is manifest that its absence affected no substantial

Underwood v. Fosha.

right of the plaintiff in error. His motion to strike out the new entry was based solely upon technical grounds, and raised no issue as to what the record should say in order to speak the truth; but the fact that it was filed, noticed, argued, submitted and decided shows that he had abundant opportunity, if he cared to exercise it, to seek a remedy for any real wrong he believed he had suffered. As was said in *Balch & wife v. Shaw*, 61 Mass. 282:

"Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party who supposes he can show such cause should apply to the court to have the record set aside or expunged, after it is made." (Page 285.)

The motion for a rehearing is denied.

All the Justices concurring.

A. F. UNDERWOOD V. HENRY F. FOSHA *et al.*

No. 14,548. (85 Pac. 564.)

SYLLABUS BY THE COURT.

SERVICE OF PROCESS—Exemptions. A resident of this state while in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county.

Error from Wyandotte district court; J. McCABE MOORE, judge. Opinion filed April 7, 1906. Affirmed.

George E. Stoker, for plaintiff in error.

Loomis, Blair & Scandrett, and *Robert J. Brock*, for defendants in error.

73	408
79	851

The opinion of the court was delivered by

MASON, J.: While Henry F. Fosha and Henry Quantic, residents of Riley county, were in Wyandotte county for the purpose of being present at the trial—the one as a defendant and the other as a material witness—of a case pending in the federal circuit court in which A. F. Underwood was the plaintiff, they were served with summons in a new action brought against them by Underwood in the district court of Wyandotte county upon a promissory note executed by Fosha and indorsed by Quantic. They appeared specially and moved that the service upon them be set aside upon the ground that while outside of the county of their residence in attendance upon a court in the capacities stated they were exempt from being sued. The motion was allowed, and the plaintiff prosecutes error.

It is a familiar rule of law, generally although not universally accepted, that apart from any statutory immunity all non-residents of a county in which they are attending court proceedings, either as litigants or witnesses, are privileged from civil arrest or the service of summons while there upon that business. Cases bearing upon this question are collected in a note at page 721 of volume 25 of the Lawyers' Reports, Annotated, and under the title "Process," in volume 40 of the Century edition of the American Digest, sections 148 and 150. The reason of the rule is that the efficient administration of justice in the courts is promoted by encouraging the personal attendance upon trials not only of the parties in interest but of other witnesses as well, the removal of the risk of being put to the inconvenience of defending a lawsuit away from home being manifestly a substantial contribution to this end. In this connection it was said, in *Ela v. Ela*, 68 N. H. 312, 36 Atl. 15:

"The right to take the deposition of a non-resident witness does not answer the requirements of justice.

It is often indispensable to a just decision of a cause, and is always desirable, that testimony shall be given orally in open court. The triers are more likely to understand the testimony fully and correctly. The appearance of the witness aids materially in forming a correct judgment of the credibility and weight of his testimony. All the issues of fact that may arise at the trial can seldom be foreseen. A fact within the knowledge of a witness may appear to be so foreign to the case when his deposition is taken that it is not deemed worth while to question him upon it, and yet the course of the trial may be such that it is the fact which will control the verdict. (See *Metcalf v. Gilmore*, 63 N. H. 174, 186-189.) Every reasonable facility should therefore be provided for obtaining the attendance of witnesses in person.

"These and other considerations have led to the establishment, quite generally, of the doctrine that non-resident witnesses are privileged from liability to be sued while attending the trial, and going to and returning from it." (Page 313.)

There is no doubt that the later and just tendency of the courts is to extend rather than to restrict the privilege referred to. So far as the case of *Quantic*, the defendant in the first action, is concerned, the ruling of the trial court may be affirmed upon the authority of *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108. It was there held:

"A witness or suitor in necessary attendance in court, either in his own behalf or under process, outside the territorial judicial jurisdiction of his residence, is exempt from civil arrest and service of summons while in attendance upon such court and while going to or returning therefrom." (Syllabus.)

It is suggested that that decision was affected by the fact that the conduct of the plaintiff, as stated in the opinion, amounted to an abuse of judicial process, inasmuch as the defendants when served with summons were in attendance upon the court not for the purpose of any trial upon the merits but merely to procure the setting aside of a wrongful service previously made upon them. This feature of the case, however,

was only incidentally mentioned, and the conclusion reached was not based upon any theory of bad faith or fraud.

The general rule stated, and the rule announced in *Bolz v. Crone*, *supra*, would be equally conclusive upon the question of the sufficiency of the service upon Fosha if he had been in compulsory attendance upon the court in virtue of having been served with a subpoena. Such, however, was not the case. He lived more than 100 miles from the place of trial, and his attendance as a witness could not have been compelled. The great weight of authority is to the effect that in the absence of an express statute controlling the matter the same protection is to be extended to one who comes voluntarily to give his testimony as to a witness brought in by process. (See the cases already referred to, and also those cited in 16 A. & E. Encycl. of L. 42.) Our civil code, however, contains this provision:

"A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending in obedience to a subpoena." (Code, § 337; Gen. Stat. 1901, § 4785.)

There is obviously plausible ground for contending that this specific grant of immunity to a witness who is acting in obedience to a subpoena implies that a mere volunteer is to be excluded from the privilege. Such seems to be the interpretation placed upon the same statutory language in Kentucky and South Dakota. (See *Currie Fertilizer Co. v. Krish*, 74 S. W. [Ky.] 268, and *Malloy v. Brewer*, 7 S. Dak. 587, 64 N. W. 1120, 58 Am. St. Rep. 856.) In Kentucky, however, there are various other provisions of the statute relating to such exemptions, from which it may fairly be gathered that there was a legislative purpose to cover the entire subject-matter, while a necessary corollary of the doctrine announced in *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108, is that such is not the case here, but, as suggested in *Cooper v. Wyman*, 122 N. C.

784, 29 S. E. 947, 65 Am. St. Rep. 731, the section of the code quoted must be held "not to be an implied repeal of the common-law exemption, but a statutory declaration of it *pro tanto*." The construction placed upon the statute by the South Dakota court in the case cited is influenced by other sections in terms making code provisions exclusive in all matters to which they relate. But even in that case it was held that the section referred to had no application to non-residents of the state, and that such persons were protected during their attendance as witnesses, although not under sub-pœna.

On the other hand, expressions made use of by the courts of Nebraska and of North Dakota, in the statutes of each of which states the section quoted is found, seem to suggest a contrary view, although the question appears not to have been directly passed upon. (See *Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727, and *Hicks v. Besuchet*, 7 N. Dak. 429, 75 N. W. 793, 66 Am. St. Rep. 665.) In the Nebraska case a non-resident of the state was held to be exempt from the service of summons while voluntarily attending court as a witness. In the North Dakota case the same rule was applied to a resident of the state who was a non-resident of the county, but although spoken of as a voluntary witness the person concerned was also in fact a suitor. In neither case was this provision of the statute referred to.

In *McAnarney v. Caughenaur*, 34 Kan. 621, 9 Pac. 476, it was held that a good service of summons might be made upon one who was attending a hearing in a United States land-office contest in a county other than that of his residence, the action being for the recovery of damages for an assault and battery committed by him during such attendance. In the opinion reference was made to the fact that he was not under sub-pœna, but this consideration could not have been controlling, as the defendant was a suitor in the contest case as well as a witness. That the action was founded upon

Underwood v. Fosha.

a wrong committed in the county where the action was brought, and during the period for which immunity was claimed, doubtless afforded sufficient ground for holding the service good. (See, in this connection, *Mullen v. Sanborn and Mann*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421, and *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. et al.*, 132 Fed. 208.)

We cannot believe that it was the purpose of the legislature in adopting the section in question to restrict, instead of to preserve, the privilege of a witness living in Kansas, by denying him all immunity from process while voluntarily attending a trial outside of his own county, when but for such enactment he would enjoy the same exemption as a non-resident of the state could claim under the same circumstances. The reason for the rule that persons living outside of the state cannot be sued while here to give testimony before a court is that they may be encouraged to come into the state for that purpose voluntarily, inasmuch as they cannot be required to do so. (*Henry B. Sherman v. W. L. Gundlach*, 37 Minn. 118, 33 N. W. 549.) In *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96, this principle was held not to apply to the case of a resident of the state who attends as a witness a trial outside of his home county, for the reason that in Missouri a subpoena may be issued to any county in the state. But in Kansas it applies with full force, for under our statute no one can be compelled to leave the county of his residence in obedience to a subpoena in a civil case. (*In re Hugbanks, Petitioner*, 44 Kan. 105, 24 Pac. 75.)

We conclude that the service of summons upon Fosha, as well as that upon Quantic, was properly set aside, and the judgment is affirmed.

All the Justices concurring.

ALICE E. BARNETT V. HENRY SCHAD, *as Sheriff, etc.*

No. 14,549. (85 Pac. 411.)

SYLLABUS BY THE COURT.

1. INJUNCTION — *Commencement of Suit — Procedure.* Where the statutes authorize the clerk of a district court to do a certain act, and authorize the judge of the same court to do another act, and the authority of each to act is dependent upon the previous action of the other, either may act first, and the two acts will be regarded in law as done at the same time, provided the acts follow one another within such reasonable time that, under the particular circumstances of the case, the difference in time may be regarded as inconsiderable.
2. PARTIES—*Suit to Enjoin Sheriff—Judgment Creditor Not a Necessary Party.* In a suit against a sheriff to enjoin him, as such officer, from selling real estate upon which he has levied an execution issued on a money judgment, the judgment creditor is a proper, but not a necessary, party defendant. The sheriff, in such a case, may make all defenses which he and the judgment creditor could make, either jointly or severally. (*Taylor v. Hosick, Adm'r, &c.*, 18 Kan. 518, 526.)

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed April 7, 1906. Reversed. Opinion denying a rehearing filed May 12, 1906.

STATEMENT.

THIS suit was brought by the plaintiff in error to enjoin the defendant in error, as sheriff of Sedgwick county, from selling land, which she alleged was her property, under an execution issued against another person. At the commencement of the suit a temporary injunction was allowed by the judge of the district court. Afterward the court, on motion of the defendant, issued an order dissolving such temporary injunction; and the plaintiff brings the case here for review of such order of dissolution.

Holmes & Yankey, for plaintiff in error.

I. P. Campbell & Son, for defendant in error.

The opinion of the court was delivered by

SMITH, J.: Six grounds were set forth in the motion to dissolve the temporary injunction, the first, second, third and sixth of which relate to the failure to issue a formal order addressed to the defendant and under the seal of the court. The temporary order was allowed at the time of commencing the suit, and "injunction allowed" was indorsed on the summons that was issued and served. (Gen. Stat. 1901, § 4690.) But it is urged in the defendant's brief that the words "injunction allowed" were not indorsed by the clerk but were written on the summons by plaintiff's attorney. In the absence of any evidence on the subject it must be presumed the indorsement was made by the clerk. A forgery will not be presumed. It follows that as to these grounds for dissolution the motion should have been denied.

The fourth and fifth grounds of the motion were really one, which was that the verified petition was not filed with the clerk before it was presented to the judge for the allowance of the order. The principal controversy on the hearing seems to have been whether the order was made by the judge immediately before the filing of the petition or immediately thereafter. Much evidence *pro* and *con* was introduced, and we assume from the ruling of the court that it found this issue in favor of the defendant. It is not within our province to weigh this evidence, and we disregard it as immaterial, except so far only as there is no conflict.

The uncontroverted evidence shows that the plaintiff with her attorney appeared in the clerk's office about the time the court opened in the adjoining room of the court-house, and, the clerk being absent, the attorney presented the petition to the deputy clerk and requested him to swear the plaintiff to the same, which he did; she subscribed her name to the oath, and he affixed his jurat and seal. The attorney either did or did not request the deputy to file the paper, but im-

mediately took the same to the judge and requested him to allow the order, which was done; and immediately thereafter the attorney returned the petition to the deputy clerk, when the papers were marked filed, including a præcipe for a summons. An injunction bond was then filed, security for costs given, and the summons issued and indorsed as before stated.

The statute (Gen. Stat. 1901, § 4686) provides that "the injunction may be granted at the time of commencing the action," and section 4487 provides that "a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." If the petition is used as the evidence upon which the injunction order is obtained the filing thereof and the order thereon cannot well be made at the same instant. Nor is this requisite. It is urged that a judge has no jurisdiction to make any order except in an action actually pending, and this may be admitted as the general rule. Under the facts of this case, however, the granting of the order and the commencement of the suit, being practically simultaneous, will be regarded as actually simultaneous. Since the granting of the order is entirely ineffective until the order is issued and served, or until a summons with the indorsement "injunction allowed" is issued and served, the rights of a defendant cannot be affected even if the allowance of the order in fact precedes the filing of the petition by a moment's time. Further, it may be said, the law necessitates the granting of the injunction before the commencement of the suit. Procuring the issuance of a summons is as essential to the commencement of a suit as is the filing of a petition, and the indorsement "injunction allowed" should, if desired, be made upon the summons at the time it is issued. If this were done before the judge or court had in fact granted the injunction, another objection, with equal force, might be based thereon. While the act of the

judge and the act of the clerk must, of necessity, be separated by some inconsiderable interval of time, the law regards both acts as done at the same time, regardless of which precedes the other.

The order of the district court dissolving the temporary injunction is reversed, and the case is remanded.

All the Justices concurring.

OPINION DENYING A PETITION FOR A REHEARING.

The opinion of the court was delivered by

SMITH, J.: All the questions raised by the defendant in error in his petition for a rehearing were considered and determined adversely to him before the decision was handed down. It may be well, however, to state more clearly the ground upon which the first paragraph of the syllabus is based, as it seems to be misapprehended.

It is conceded that a district judge should make no order allowing an injunction until a suit for an injunction has been commenced in his court. A suit is commenced by filing a petition and causing a summons to be issued thereon (Code, § 57; Gen. Stat. 1901, § 4487), and, when an injunction is allowed at the commencement of the suit, the clerk should indorse upon the summons "injunction allowed." (Code, § 243; Gen. Stat. 1901, § 4690.) Thus it appears the summons should issue before the making of the order and the order should be made before the issuance of the summons. The difficulty is usually overcome by first filing the petition, then procuring the order, and then procuring the issuance of summons with the indorsement. This solution, however, is more apparent than real.

The contention that there was a defect of parties defendant in failing to join the judgment creditor with

Briggs v. Voss.

the sheriff was not overlooked, although not mentioned in the decision. The judgment creditor was a proper party, but was not a *necessary* party. He could make any defense he had through his agent, the sheriff, or, if he had desired, he could have asked, by motion, to be made a party, and such application, in the discretion of the court, could have been allowed. The sheriff, however, could have made any defense which he and the creditor, jointly or severally, could have made. Hence the creditor was not a necessary party. (*Taylor v. Hosick, Adm'r, &c.*, 13 Kan. 518, 526.)

The petition for a rehearing is denied.

All the Justices concurring.

CLARENCE BRIGGS V. THOMAS VOSS, *as Marshal,*
etc., et al.

No. 14,551. (85 Pac. 571.)

SYLLABUS BY THE COURT.

OFFICE AND OFFICERS—*De Facto Judge Pro Tem.*—*Validity of Acts.* One who claims to act as judge *pro tem.* of a city court by virtue of an appointment filed in a public office, and is recognized by the clerk and marshal of the court, and by litigants, attorneys, and others, as judge *pro tem.*, is a *de facto* officer, and his acts, and judgments rendered by him while so acting, cannot be attacked in a collateral proceeding.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed April 7, 1906. Affirmed.

I. P. Campbell & Son, for plaintiff in error.

Blake & Ayres, for defendants in error.

The opinion of the court was delivered by

PORTER, J.: Plaintiff in error brought this suit to enjoin an execution issued upon a judgment recovered in the city court of Wichita. From a judgment of the

Briggs v. Voss.

district court dissolving the temporary injunction he brings the case here for review.

The execution sought to be enjoined was issued upon a judgment against Briggs in an action of forcible entry and detainer, rendered by James A. Conly as judge *pro tem.* of the city court of Wichita, and it is claimed that he was neither a judge *de jure* nor *de facto*, and that the judgment for that reason was void. George H. Alexander was the regular judge, and Conly claimed to be acting by virtue of an appointment made by him. The statute creating the city court of Wichita (Laws 1899, ch. 130) provides:

“SEC. 13. In case of the absence, sickness or disability of the judge of said court, such judge may appoint a judge *pro tem.* of said court, who shall hold court for him and hear and determine any matter pending therein to the same extent that such absent or disabled judge might do if personally present, and such judge *pro tem.* shall fill such position until the judge of said court can be personally present.”

On account of failing health Judge Alexander left the city of Wichita December 7, 1904, and went to Arizona. February 23, 1905, he returned, but was never able after that to resume his official duties, and remained at his home until his death. On December 6, the day previous to his departure for Arizona, Judge Alexander appointed A. S. Houck as judge *pro tem.*, under the provisions of section 13, *supra*, and, at the suggestion of Mr. Houck that occasions might arise when Mr. Houck would be absent or disqualified from acting, Judge Alexander signed thirty blank appointments, leaving the name of the judge *pro tem.* to be written in as occasion might require, and handed them to Mr. Houck. For a time Judge Houck acted as judge *pro tem.*, and when he was unable to act he handed one of these blank appointments to James A. Conly, who filled in his name, took the oath of office, and acted as judge *pro tem.* On March 6, 1905, after the return of Judge Alexander, Houck handed one of these blank appointments to Conly, and the latter wrote his name

in the blank space and qualified by taking the oath of office before the clerk of the district court, as provided by section 15 of chapter 130, Laws of 1899. His oath of office as such judge was on file with the clerk of the district court, and he continued to discharge the duties of the office under this appointment from March 6 until after the trial of the forcible-entry-and-detainer action, which occurred March 16, 1905. He was recognized as judge *pro tem.* of the court by the officers of the city court, the clerk and marshal, and by litigants and attorneys. The parties in the forcible-entry-and-detainer case appeared before him, the case was tried, judgment rendered, and an appeal taken by plaintiff in error to the district court. The appeal was afterward dismissed and this action brought to enjoin the execution.

The one question here is whether James A. Conly was a *de facto* judge *pro tem.* at the time the judgment was rendered. He was exercising the duties of the office, claiming the right and authority to do so by an appointment regular on its face. So far as the public knew, this appointment was in all respects regular. There was the situation contemplated by the statute: the regular judge was sick and disabled from acting; he was present in the city with authority to appoint; and there was on file in the office of the clerk of the court what purported to be his written appointment of Conly, with the latter's oath of office. The officers of the court recognized Conly as judge *pro tem.*, and issued and served process in his name; the litigants and attorneys recognized him as such judge *pro tem.* These facts bring the case squarely within the rule laid down by this court in numerous cases.

Chief Justice Butler's definition of a *de facto* officer in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, is followed in *Railway Co. v. Preston*, 63 Kan. 819, 823, 66 Pac. 1050. The third subdivision of this well-recognized definition applies to this case, where the duties of the office have been exercised, "under color of a

known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public." (Page 472. See, also, *Ritchie v. Mulvane*, 39 Kan. 241, 17 Pac. 830.)

While this is a direct attack upon the judgment, it is a collateral attack upon the acts of the officer. It was said in *The State v. Williams*, 61 Kan. 739, 741, 60 Pac. 1050:

"The acts of a *de facto* judge cannot be collaterally attacked, and his right to the office is not open to question except in a direct proceeding brought by the state; and this is true in a case where the officer is incapable of holding office."

The principles which control these decisions are firmly established; they may be said to lie close to the foundations of law and order and the stability of government. It is clear that James A. Conly was the *de facto* judge *pro tem.* of the city court when the judgment was rendered, and it follows that his acts as such judge cannot be attacked in this collateral proceeding, and that the temporary injunction was properly dissolved. The judgment is affirmed.

All the Justices concurring.

W. B. HURST, *Doing Business as W. B. Hurst & Co.*,
V. THE ALTAMONT MANUFACTURING COMPANY.

No. 14,552. (85 Pac. 551.)

SYLLABUS BY THE COURT.

1. CONTRACT—*Sale—Delivery “f. o. b.”—Duty to Furnish Cars.*
When a seller of merchandise agrees to sell twenty car-loads thereof, to be delivered to the buyer “f. o. b. cars” at the seller’s place of business, it is not the duty of the buyer to furnish the cars to receive the goods; and, in an action by the buyer against the seller to recover damages for non-delivery of the merchandise under such a contract, the petition need not allege that the plaintiff furnished cars ready to receive the goods.
2. WORDS AND PHRASES—*“f. o. b. Cars” Defined.* The phrase “f. o. b. cars,” when used in a contract between a buyer and seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the consignment and shipment of the goods to the buyer, free of expense to him.

Error from Bourbon district court; WALTER L. SIMONS, judge. Opinion filed April 7, 1906. Reversed.

John H. Crain, and *John V. McKinney*, for plaintiff in error.

Keene & Gates, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: A demurrer was sustained to the plaintiff’s petition by the district court. The plaintiff excepted, and brings that question here for review. The demurrer contained two grounds: (1) That several causes of action were improperly joined; (2) that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained generally. The record does not show whether the court considered the petition insufficient for both reasons or not. The case has been argued as though the second

Hurst v. Manufacturing Co.

ground of the demurrer was the only one involved, and we shall so assume.

The petition is of considerable length, and the points discussed by counsel can be sufficiently stated without giving a full copy of the pleading. After the proper formal and introductory averments the petition states, in substance, that the defendant offered to sell to the plaintiff certain goods, at a stated price, as shown by "Exhibit A"; that the plaintiff accepted the offer, as shown by "Exhibit B"; that the plaintiff afterward made an additional order, as shown by "Exhibit C"; that later the plaintiff, by letter, confirmed and renewed previous orders, which were accepted by the president of the defendant company, as shown by "Exhibit D"; that in pursuance thereof shipping orders were sent to, and received by, the defendant, as shown by "Exhibit E"; that defendant received all shipping orders sent by the plaintiff as aforesaid, but "neglected and refused to deliver said egg-cases as it agreed to do, and as ordered by this plaintiff"; that at the time the first shipment should have been made, and ever since, such egg-cases have been worth from one and a quarter to two cents more than the contract price; and that the plaintiff has been damaged \$1000. Then follows a prayer for judgment. The exhibits are as follow:

"EXHIBIT A."

"ALTAMONT, ILL., January 31, 1908.

"W. B. Hurst & Co., St. Louis, Mo.:

"DEAR SIR—Yours of yesterday at hand ordering ten cars standard whitewood cottonwood-veneer egg-cases. We note that you speak of a one-piece end. The case we quoted you on has a two-piece dressed end, ready cleated. The price quoted you of nine cents, cars, factory, is at the Cairo, Ill., factory, and the rates as before named you are as follow: Eldorado, six cts. per 100; Marion, five cts. per 100; Mt. Vernon, seven cts. per 100.

"Terms are as you mentioned: two per cent. off for cash ten days from date of invoice.

"These cases average seven and one-half pounds

Hurst v. Manufacturing Co.

each—possibly a little less. Hence it is no trouble to tell almost precisely what the case will cost you f. o. b. cars at the above-named stations. Cars are very scarce, and we would suggest that you place your order early; say at least twenty days in advance of time you expect to use them. Awaiting your prompt reply, we are,

Respectfully yours,

ALTAMONT MANUFACTURING COMPANY."

"EXHIBIT B."

"ST. LOUIS, Mo., February 2, 1903.

"Altamont Manufacturing Company, Altamont, Ill.:

"DEAR SIRs—Replying to your favor of the 31st, if ends are two piece and cleated, as you say they are, balance of case filling required dimensions, being a standard whitewood case (veneer), it is all right. We will take the ten cars. You may file our order now for shipment of one car to Fayetteville, Ark., and one car to our address, South Greenfield, Mo. Would be glad to have you get these off at as early a date as possible. Since we know that the cases are at Cairo, we have bought a great many there, and know what the freight rates are ourselves to our various stations.

Yours truly, W. B. HURST & Co."

"EXHIBIT C."

"ST. LOUIS, Mo., February 5, 1903.

"Altamont Egg-case Company, Altamont, Ill.:

"GENTLEMEN—Confirming our conversation by telephone this morning, you can enter our order for ten more cars of cases to be same as last order of ten cars, at nine cents f. o. b. Cairo. We instruct you to order out, immediately, one car to Fredonia, Kan.; one car to Monett, Mo.; one car to Harrison, Ark.; one car to Springfield, Mo.; one car to Fort Scott, Kan. On the 3d we gave you order for one car for S. Greenfield, Mo., and one car to Fayetteville, Ark. Let these cars go forward first, the Fredonia car next, and then let the others go as they come.

"Now, relative to your pay: Do not worry about that. We supposed that Dun and Bradstreet had our rating. But you have our permission to address them, or to address the Citizens' National Bank of Fort Scott, Kan., National Exchange Bank, Springfield, Mo., Bank of Commerce here, or any of the commercial agencies. It is our intention, however, to discount all these cases, as the old company did with you. We are

Hurst v. Manufacturing Co.

agreeable to your passing draft if you desire, but make it subject to arrival of car, for we would not want to pay the draft until cars arrived and were properly checked. Kindly let us hear from you promptly confirming above order, and oblige,

Yours truly, W. B. HURST & Co."

"EXHIBIT D."

"ST. LOUIS, MO., 2-9-'03.

"Altamont Manufacturing Company, Altamont, Ill.:

"GENTLEMEN—This will confirm purchase from you of thirteen cars of veneer cases (in addition to the seven cars, orders for which have already been placed with you) at nine cents track, Cairo, Ill., the case to be standard veneer case, made of cottonwood.

"We will give you shipping instructions on these thirteen cars within the next few days.

Yours very truly, W. B. HURST & Co."

"Accepted: Altamont Manufacturing Company—
J. E. R."

"EXHIBIT E."

"February 18, 1903.

"Altamont Manufacturing Company, Altamont, Ill.:

"DEAR SIRs—To conform with our contract entered into a few days ago, you will kindly book our orders on thirteen cars of cases, to be shipped as promptly as possible to the following points: Two cars to Springfield, Mo.; two cars to S. Greenfield, Mo.; one car to Fredonia, Kan.; one car to Parsons, Kan.; one car to Cuba, Mo.; three cars to Monett, Mo.; one car to Clinton, Mo.; one car to Fayetteville, Mo.

"We would like, if possible, for you to fill these cars in the following order, shipping the first two cars to Fayetteville, Ark., two cars to Springfield, Mo., two cars to South Greenfield, Mo., three cars to Monett, Mo., one car to Clinton, Mo., one car to Cuba, Mo., one car to Parsons, Kan., one car to Fredonia, Kan.

"All of these points are now ready to take the cars in as promptly as they are shipped; so kindly move them as promptly as you can.

"Our egg season is open, and we will need them all between now and March 1.

Yours truly,
W. B. HURST & Co."

The supposed weakness of this petition, as we understand from the discussion of counsel, lies in its want of an allegation that the plaintiff furnished the

Hurst v. Manufacturing Co.

necessary cars at the time when shipment was desired. On the other hand, it is contended that it was the duty of the defendant to obtain the cars from the carrier, load the goods therein, and consign them to the plaintiff. The real point in the controversy, therefore, seems to be this: Whose duty was it under the contract between these parties to cause the carrier to place cars in position to receive the goods to be shipped?

The exhibits attached to the petition constitute the contract. If concisely stated, it would be substantially as follows: Ship to us immediately, or as promptly as possible, twenty cars of egg-cases, distributed as hereinafter stated. We will pay therefor nine cents a case, f. o. b. cars at Cairo, Ill., payment to be made when cars arrive at the point of destination. This order was accepted.

In construing this contract the difficulty centers in determining what the parties intended by the clause "f. o. b. cars, Cairo, Ill." It is conceded that the letters "f. o. b." are for brevity used instead of the words "free on board." The clause when expressed in words, therefore, stands thus: Free on board the cars at Cairo, Ill. This language has been used in the transaction of commercial business many years, and has by general custom and usage among buyers, sellers and shippers acquired a definite and specific meaning, which is well understood and of common knowledge, and of which courts will take judicial notice. The significance of this language, when standing alone, is so well established that it has been generally held that proof in support of such signification is unnecessary and improper. (*Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672; *Capehart et al. v. Furman Farm Improvement Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989; *Hunter v. Kramer*, 71 Kan. 468, 80 Pac. 963.)

Hurst v. Manufacturing Co.

This, like any other language, may, however, be used in a sense different from that in which it is generally understood; and it may receive an interpretation from the acts of the parties using it different from what the words seem to indicate. It is important to bear this in mind, as in the decided cases where the words "free on board the cars" have been defined the decisions generally turn upon some modifying circumstance, wholly outside of, and apart from, the language itself. The decisions are practically unanimous in holding that these words bind the seller to place the goods on board the cars free of expense to the buyer; also that the carrier is the bailee of the consignee, and that delivery to the carrier amounts to delivery to the buyer. We are asked to extend this meaning a step further.

It is apparent that the goods cannot be loaded until cars are in place to receive them. The duty to select the carrier and cause it to furnish the cars rests somewhere. The plaintiff in error insists that this duty belongs to the seller. At this point the authorities part company, and seem to be somewhat conflicting. A careful examination of the cases, however, shows this conflict to be more apparent than real. A few decisions, fairly recent in date, have held that this duty devolves upon the buyer. These cases, however, are limited to the particular facts presented, and in nearly every instance such facts furnish a reason for the meaning given to the contract under consideration. The most important of these cases are: *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126; *Hocking v. Hamilton et al.*, Appellants, 158 Pa. St. 107, 27 Atl. 836; *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 658, 49 C. C. A. 419; *Evanston Elevator & Coal Co. v. Castner*, 133 Fed. 409; *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, 326, 74 N. W. 670, 40 L. R. A. 534.

In the case of *Consolidated Coal Co. v. Schneider*, *supra*, the coal company leased its mine to the plain-

Hurst v. Manufacturing Co.

tiff, whereby the lessee was to furnish coal to the lessor, to be delivered at the mine, which was some distance from the railroad station. The lessor furnished cars for a time, and stated that it would continue to do so. Under these facts it was held to be the duty of the lessor to furnish the cars.

In the case of *Hocking v. Hamilton et al.*, Appellants, *supra*, the commodity sold was coal, to be delivered at the tippie, and the buyer agreed to receive it there. This was not a contract to deliver at any railroad station, but at a different place, and because of this agreement it was held to be the duty of the buyer to furnish the cars.

In the case of *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, *supra*, the plaintiff sold some old rails to the defendant, to be shipped upon orders stating destination and name of consignee, and no such orders were given. It was held that as the shipper could not know when, where or to whom the shipment was to be made he was not bound to furnish the cars.

The case of *Evanston Elevator & Coal Co. v. Castner*, *supra*, was also a case where coal was to be delivered at the mine. In that case the court referred to the foregoing and other cases, and while apparently approving all of them limited the decision to the facts of that case, and held it to be the duty of the buyer to furnish the cars, but did not decide what the phrase "f. o. b." means when standing alone.

The following cases hold that, under the *prima facie* meaning of the phrase "f. o. b.," it is the duty of the buyer to furnish the cars: *Kunkle v. Mitchell*, 56 Pa. St. 100; *Wackerbarth v. Masson*, 3 Camp. (Eng.) 270; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32; *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274, 278.

In the case of *Boyington and another v. Sweeney*, 77 Wis. 55, 45 N. W. 938, it was held that the duty of furnishing the cars rested upon the buyer. This de-

Hurst v. Manufacturing Co.

cision was practically overruled by the subsequent case of *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, and the contrary rule was adopted. The latter case was followed in the later case of *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989, decided by the same court in September, 1904.

A noticeable feature of the cases here cited holding it to be the duty of the buyer to furnish the cars is that none of them involves an ordinary commercial transaction like, or similar to, the one here presented. On the contrary, each case had peculiar and exceptional conditions which clearly distinguish it from this case, and which furnished the reason for the decision given. We do not, therefore, regard these cases as in point on the question here involved.

This case can be disposed of, so far as the demurrer is concerned, without defining the meaning of the phrase "f. o. b. cars, Cairo, Ill.," when standing alone. We think the correspondence attached to the plaintiff's petition, when considered as a whole, contains language outside of this phrase which fairly indicates what was intended by it. It is not difficult to hold, aided by this language, that the formula "f. o. b. cars, Cairo, Ill.," was understood by both parties to mean that the defendant would do all that was necessary to be done to accomplish the shipment of the goods to the plaintiff as directed, free of expense or further attention on the part of the latter.

Here this opinion might end. But the case must be returned for further proceedings, and as we cannot anticipate what facts will be developed when the issues are finally closed we deem it best to consider and decide the whole question discussed by the parties. It is our understanding that the phrase or formula "f. o. b. cars" has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning, generally understood by all business people. When such phrase or formula is used

Hurst v. Manufacturing Co.

in a business contract, between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will, at his own expense, do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the procuring of cars upon which to load the commodities sold; and when nothing appears to modify or limit this meaning courts should enforce the contract so as to effectuate this intent. This rule is reasonable; it harmonizes with existing business conditions, and is the universal practice among business people.

It is conceded that by this phrase the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an understanding the contract would be incomplete and unenforceable. What the parties intended upon this subject can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions, must be considered.

It is within common knowledge that carriers are willing and even anxious to receive freight for transportation, and to invite business they furnish every reasonable facility and convenience to shippers. It is also well known that wholesale houses and manufacturing establishments have special shipping arrangements with carriers, whereby their business is provided for and accommodated. The facilities of the latter for the procurement of cars are, for many reasons, superior to those of the buyer.

In large cities where many railroads center, having

receiving stations more or less remote from each other, it might be a material advantage to a shipper to have the privilege of selecting the carrier to whom his goods should be delivered, which he might do if it was his duty to furnish the cars. The inconvenience which the seller would encounter in securing cars upon which to load the goods sold is merely nominal, while the difficulties to which the buyer would be subjected are such that it would be unreasonable to assume that he would undertake so to do. In view of the many serious objections in the way of such a contract it seems clear that, if the parties to the agreement under consideration had deemed it necessary to state specifically who should perform this duty, the seller would have been named. This manifest intention of the parties should be made effectual by giving to their contract the same legal effect which it would have if such agreement had been specifically written therein.

In the case of *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, where the meaning of the phrase "f. o. b. cars" was the point discussed, it was said: "It would seem pretty obvious that one undertaking to load logs upon railroad-cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work." (Page 471.) It was also said: "We cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on the appellants the duty of obtaining the cars upon which they had agreed to load the logs." (Page 474.) This language was approved and followed in the case of *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

We conclude that the judgment of the district court should be reversed. It is, therefore, directed that such judgment be vacated; that the demurrer to the petition be overruled; and that the further proceedings had be in accordance with the views herein expressed.

All the Justices concurring.

Duncan v. Huse.

J. D. DUNCAN v. A. F. HUSE, *Doing Business as the A. F. Huse Coal Company.*

No. 14,556. (85 Pac. 589.)

SYLLABUS BY THE COURT.

PRACTICE, DISTRICT COURT—*Demurrer to the Evidence.* Upon a demurrer to the evidence the trial court is not called upon to weigh the evidence. If there is any testimony tending to establish the material facts necessary to sustain the plaintiff's cause of action the demurrer should be overruled.

Error from Cowley district court; CARROLL L. SWARTS, judge. Opinion filed April 7, 1906. Reversed.

C. T. Atkinson, for plaintiff in error.

L. C. Brown, for defendant in error.

The opinion of the court was delivered by

GREENE, J.: J. D. Duncan sued A. F. Huse on a promissory note. The note was signed "A. F. Huse Coal Company, per Alex. Wilson." The defendant denied that he had ever executed the note, or that Alex. Wilson had any authority to execute a note for him or for the A. F. Huse Coal Company. The court sustained a demurrer to the plaintiff's evidence, and rendered a judgment for the defendant.

This presents the question whether the evidence introduced by the plaintiff, construing it in the most favorable light for him, raised a question of fact for the consideration of the jury. The material part of the evidence introduced by the plaintiff is as follows, the testimony of the first witness being that of A. F. Huse:

"Ques. What business were you engaged in at Arkansas City during the time you were there and for several years prior to going to Manhattan, Kan.? Ans. In the coal business, and in the implement business; and was in the hardware business a short time.

"Q. Now, did you sell your business when you left Arkansas City to go to Manhattan? A. No, sir; I had the coal business there.

Duncan v. Huse.

"Q. You left the coal business? A. Yes.

"Q. When was that? A. It was in April, 1901."

"Q. Well, now, whom did you leave in possession of your coal-yard down there? A. I left Alex. Wilson.

"Q. You left Alex. Wilson? A. Yes, sir.

"Q. Now, when you left there you left him in possession of everything there, did you? A. I left him there to run the business for me."

"Q. He conducted everything connected with the coal-yard and fully represented you? A. Yes, under my instructions.

"Q. When did you sell this coal-yard out? A. Sold it out in '93 I think—

"Q. In 1903? A. 1903; I mean 1903.

"Q. About what time? A. I think it was September.

"Q. September, 1903? A. I think it was the latter part of September.

"Q. You think it was the latter part of September? A. I think that is when it was.

"Q. Now, from the time you left, in 1901, until 1903, Mr. Wilson had control of all the business there—of the coal business? A. He had charge of the business there for me; yes, sir."

J. D. Duncan testified:

"Ques. Now, during the time that Mr. Wilson was there as one of his clerks was he a minor or subordinate clerk, or chief clerk? Ans. Why, he seemed to be chief clerk; he done the business.

"Q. Now, at the times that Mr. Wilson was in charge there, and Mr. Huse was still there also in that business, did Mr. Huse ever borrow any money from you? A. Yes, sir.

"Q. Through whom did he borrow it? A. Alex. Wilson.

"Q. Who paid it afterward? A. Huse.

"Q. Huse paid it himself? A. Yes, sir.

"Q. Now, coming down to the time that Mr. Huse left, as he says—you heard his testimony, did you? A. Yes, sir.

"Q. Now, he states that Mr. Alex. Wilson had charge of his business there? A. Yes, sir.

"Q. Was you around there as a rule? A. I was there sometimes; not very often.

Duncan v. Huse.

"Q. Did you have a conversation with him about the business? A. Alex. Wilson?

"Q. Yes. A. Yes, sir.

"Q. It was while he was in possession there of the business as Mr. Huse has stated he placed him there? A. Yes, sir.

"Q. Now, on or about the 6th of July, did you have any conversation with him about borrowing money? A. Yes, sir.

"Q. Did he borrow any money from you for this company? A. Yes; after coaxing hard.

"Q. You may look at that note. A. That is the note he gave me.

"Q. Now, what did he say to you, at the time he gave you this note, about what he wanted the money for—if connected with this business, I mean? A. He said the bank refused to let him have any more money and he had to borrow it to save Huse—to buy coal with."

Albert H. Denton testified that he was the cashier of the Farmers' State Bank of Arkansas City; that he knew A. F. Huse and John D. Duncan, and Alex. Wilson during his lifetime; that Huse conducted the coal business in person until 1901; that when he left he left Alex. Wilson in charge; that the business was conducted in the name of the A. F. Huse Coal Company thereafter; that they did business at his bank a part of the time; that they drew checks signed by the A. F. Huse Coal Company, by Alex. Wilson; that the coal company had borrowed money at his bank; that the note was signed "A. F. Huse Coal Company, by Alex. Wilson"; and that besides the note given to his bank signed in this manner, and afterward paid, he had seen seven other notes signed in the same way.

George S. Hartley testified that he was in the banking business in the Citizens' State Bank; that during the time that Mr. Wilson was in control and management of the business he transacted business at his bank; that he borrowed money there for the A. F. Huse Coal Company; that at the time he borrowed the

Ehrsam v. Jackman.

money he gave notes to the amount of \$1500 as evidence of the debt; that the notes were signed "A. F. Huse Coal Company, by Alex. Wilson," were renewed by Alex. Wilson, and afterward paid by Huse.

This court has no hesitancy in saying that under the evidence the case should have been submitted to the jury. The judgment is reversed, and the cause remanded.

All the Justices concurring.

THE J. B. EHRSAM & SONS MANUFACTURING COMPANY V. R. C. JACKMAN.

No. 14,558. (85 Pac. 559.)

SYLLABUS BY THE COURT.

1. *CONTRACTS—Sale of Machinery—Guaranty—Conditional Test.* It is competent for parties to a contract for the sale of mill machinery and its installation in a mill to provide that a guaranteed capacity shall be demonstrated by an actual operation of the mill under certain conditions before payment of the price. Such a provision is not collateral, and the prescribed test must be made or waived before an action for the price can be maintained.
2. ——— *Agreement Construed—Condition Precedent to Payment.* A contract for the sale of mill machinery and its installation in a mill which provides that when the machinery is operated so as to meet the requirements of a milling guaranty under which it is sold the purchaser will accept and pay for it, which guarantees that the mill will perform according to the milling guaranty when operated by the seller, and which requires the purchaser to furnish wheat, labor and power to operate the mill at its full capacity when the seller is ready to operate it, contemplates a mill-run demonstration of the guaranteed capacity of the mill as a condition precedent to the payment of the price.
3. ——— *Rules of Interpretation.* In arriving at the meaning of a contract the court should give effect to each word if possible, should take into consideration all its parts in ascertaining the meaning of each particular part, should construe

Ehrsam v. Jackman.

written and printed portions together when they do not contradict each other, and should give weight to the practical construction placed upon the instrument by the parties themselves before litigation arose.

4. ——— *Default of Purchaser.* If the purchaser of mill machinery under a contract of the character described should, upon request of the seller, furnish wheat for a test run, but the wheat should be inferior in quality to that stipulated for and the mill should fail to develop its guaranteed capacity, the purchaser cannot take advantage of his own default and claim that the test is conclusive.
5. ——— *Use of Machinery by Purchaser—Test Not Waived.* The use by the purchaser of mill machinery sold under a contract of the character described, pending a test of the capacity of the mill which the purchaser is under no obligation to bring about and which the seller can delay indefinitely, does not constitute a waiver of the test or relieve the seller of the burden of showing that the mill complies with the guaranty, if such use is not in violation of the contract or prejudicial to the seller's rights.
6. *PETITION—Election of Counts.* A count of a petition which claims the price of property on the theory that the plaintiff has parted with title to it by sale, and that the defendant owns it and hence is entitled to its possession, is inconsistent with another count which asks damages as in trover for the conversion of the same property on the theory that the plaintiff owned it and was entitled to its possession; and it is not error to require an election between such counts.

Error from Ottawa district court; **ROLLIN R. REES**, judge. Opinion filed April 7, 1906. Affirmed. Opinion denying a rehearing filed May 12, 1906.

STATEMENT.

THE plaintiff manufactures and erects mill machinery, and the defendant owns a flour-mill. The petition contains three counts. The first one pleads a contract whereby the plaintiff undertook to furnish and set up certain machinery for defendant's mill for a price which the defendant agreed to pay. Performance by the plaintiff is alleged, credit is allowed for payments made, and the balance of the contract price is demanded, together with the foreclosure of a lien upon

the mill property which the defendant perfected. The second count pleads specially a clause of the contract retaining title to the machinery until the price is paid. Default on the part of the defendant, demand for a return of the property and refusal to comply with the demand are alleged, and damages as for a conversion are claimed. The third count prays for the price of extras which the plaintiff placed in the mill.

The answer denied performance of the contract, pleads its breach, and asks for damages occasioned thereby.

On motion, the plaintiff was required to elect between the first and second counts of the petition. It chose to go to trial upon the first count, and the second was stricken out. The court made findings of fact and conclusions of law as follow:

"FINDINGS OF FACT.

"The court finds:

"(1) That the plaintiff now is, and that during all the times mentioned in its petition herein it has been, a corporation, duly organized and existing under and by virtue of the laws of the state of Kansas.

"(2) That on the 27th day of March, 1903, the defendant, R. C. Jackman, was, and ever since that time has been, the owner of the real estate described in the petition, and of the flouring-mill thereon.

"(3) That on the 27th day of March, 1903, the plaintiff and defendant made and entered into a certain written contract, using therefor a blank furnished by the plaintiff, which said contract was partly printed and partly written, and was in words, letters and figures as follows, to wit [the material portions of the contract are as follow]:

" 'GUARANTY.

"The first party makes the following guaranty, viz.: That the machinery herein mentioned to be furnished by the first party shall be made of good material, and in a workmanlike manner. Should any part be found defective in material or workmanship within six months from date of acceptance, the first party promises to perform this guaranty by making good said part at the shops of the first party and allow freight, without additional compensation. When said machinery and material are properly set up according to the first party's plan and flow sheet, and when operated under direction of the first party, said mill will be capable of producing flour in quality, percent-

Ehram v. Jackman.

age and yield equal to that made on any mill of any make having an equivalent line of machinery and milling like grade, quantity and quality of wheat. [Printed.] The first party further guarantees that said mill will have a capacity of two hundred (200) barrels of flour, all grades, per run of twenty-four hours, and will be capable of producing a barrel of flour of all grades from four bushels and twenty-four pounds of No. 2 wheat, cleaned on the receiving separator; the percentage of low grade not to exceed three per cent. [Written.]

"The leather belting is guaranteed to be of first-class quality, and will be replaced free of charge if found defective. [Written.]

"The second party promises to provide promptly a suitable building ready for the installation of said machinery and material, to provide for heating and lighting said building during progress of work, to furnish material for and build all foundations, to do all masonwork, including the cutting of walls, to convey machinery and material from cars to mill-house, and, whenever the first party is ready to operate said machinery, to furnish good, plump, dry milling wheat, labor and power to operate mill at full capacity, and not to hold the first party liable for damages caused by delays incident to starting up.

"The second party also promises that when said machinery is operated so as to fulfil the milling guaranty herein stated, then and thereupon the second party shall accept said mill and settle therefor according to the terms herein mentioned.

"It is understood and agreed that until said mill shall have been accepted and paid for the first party shall have, for itself and its servants, the right of access to any and every part of said premises, for the purpose of carrying out the provisions of this agreement. [Printed.]

"The second party further promises to pay to the first party, without relief from valuation or appraisal, exemption and bankrupt laws, and without cost or expense to said first party, the sum of (\$5000) five thousand and no-100 dollars, in installments as follows, to wit: Upon arrival of machinery, \$2500; when mill is started and milling guaranty fulfilled, \$1000; three months after mill is started and guaranty fulfilled, \$770; on January 1, 1904, \$730.' [Partly printed and partly written.]

"(4) That the plaintiff furnished all the machinery provided for in said contract, and put the same into the mill, which was completed, with the exception of some slight alterations afterward made in the flow sheet, about the 20th day of August, 1903.

"(5) That upon arrival of the machinery as provided in the contract the defendant paid to the plaintiff \$2500, and that he sold to the plaintiff certain old machinery which was taken and accepted as a payment of the \$730 which was due January 1, 1904, by the terms of the contract, and that in anticipation of a completion of the contract he advanced to the plaintiff \$45, but failed and refused to make any further payments.

"(6) That all of the machinery sold to the defendant was with the express understanding that it should be

Ehram v. Jackman.

set up, and in fact it afterward was set up, in defendant's mill.

"(7) That the defendant furnished all the material and labor he was required to to complete said mill, and all the labor and power he was required to in making the tests provided for in the contract.

"(8) That on two separate occasions the plaintiff, deeming the mill complete, attempted to make tests of the mill as to its fulfilment of the guaranties set out in the contract, and the defendant at each of these times furnished a very high grade of wheat, testing sixty-one pounds to the bushel, for the purpose of being used in these tests, but on each of these occasions, after operating the mill a while, without any fault on the part of the defendant, the tests were abandoned at the suggestion of the plaintiff.

"(9) That thereafter the plaintiff wrote to the defendant as follows:

"'ENTERPRISE, KAN., October 12, 1903.

"'Mr. R. C. Jackman, Minneapolis, Kan.:

"'DEAR SIR—The sample of wheat which you promised to send us on Friday has not been received, and since telephoning to-day we find that you forgot to send it. Now this matter has been dragging along enough, and we insist that you send us a sample of the wheat which you promise to furnish us to be used in making a test run of your mill. If this wheat grades in accordance with the grades called for in our contract we will make arrangements to make a test run of your mill without delay. Give this matter immediate attention, please.

Yours truly,

THE J. B. EHRSAM & SONS MANUFACTURING COMPANY.

Per J. B. EHRSAM, J. J. A.'

"(10) That immediately upon the receipt of this letter the defendant sent to the plaintiff, at Enterprise, Kan., by express, a sample of No. 2 wheat testing fifty-nine pounds to the bushel, and requested that the wheat from which this sample was taken be used in making the test.

"(11) That after receiving this sample, and on the 23d day of October, 1903, the plaintiff sent its representatives to Minneapolis, for the purpose of making the test, and the defendant furnished several hundred bushels of the wheat from which the sample referred to in finding No. 10 had been taken, to be used by the plaintiff in making another test; and the plaintiff thereupon took charge of the mill and operated the same, but was unable to make a barrel of flour out of four bushels and twenty-four pounds of the wheat furnished, it requiring of the wheat furnished four bushels and thirty-

four and one-half pounds to produce a barrel of flour of all grades, with not to exceed three per cent. of low grade.

"(12) That all the wheat used in making this last test was dry No. 2 wheat, testing fifty-nine pounds to the bushel before being cleaned over the receiving separator, but that such wheat was not good, plump, dry No. 2 milling wheat, some of the grains being bleached and shriveled.

"(13) That the defendant made no complaint of the grinding quality or capacity of the mill, except that it would not produce a barrel of flour from four bushels and twenty-four pounds of the wheat furnished, with not to exceed three per cent. low grade.

"(14) That the said mill has never at any time since its completion been capable of producing a barrel of flour of all grades, with not to exceed three per cent. of low-grade flour, from four bushels and twenty-four pounds of No. 2 wheat, testing not to exceed fifty-nine pounds to the bushel, cleaned on the receiving separator.

"(15) That said mill has never at any time since its completion been capable of producing a barrel of flour of all grades, with not to exceed three per cent. of low-grade flour, from four bushels and twenty-four pounds of No. 2 wheat, not testing to exceed fifty-nine pounds to the bushel.

"(16) That the plaintiff furnished to the defendant at his request the extras mentioned in the third count to the petition, and that the amount due thereon from the defendant to the plaintiff is the sum of \$461.34.

"(17) That on the 30th day of September, 1903, the plaintiff filed in the office of the clerk of this court its statement of a lien, duly verified, a true copy of which is attached to plaintiff's petition.

"(18) That as soon as said mill was completed, and before any of the tests were made, the defendant commenced to operate said mill and has been continuing to operate it ever since.

"(19) That the roll-belts were not first-class belting.

"(20) That the clutch-coupling was defective when set up in said mill.

"(21) That from the 1st day of September, 1902, until the 1st day of September, 1903, according to the rules in force adopted by the grain-inspection department of the state of Kansas, the following regulations

were in force determining what should constitute No. 1 hard wheat and No. 2 hard wheat:

"No. 1 hard shall be pure and hard winter wheat, sound, plump, and well cleaned, and shall weigh not less than sixty-one pounds to the bushel.

"No. 2 hard shall be sound, dry and reasonably clean hard winter wheat, and shall weigh not less than fifty-nine pounds to the bushel."

"(22) Quality and weight of wheat were, in the year 1903, in the vicinity of said mill, both considered in determining its grades. The lowest weight for No. 2 hard wheat was fifty-nine pounds to the bushel, while that weighing sixty and sixty-one was also graded as No. 2, if it otherwise had the requisite qualities. No wheat was graded No. 1 in that vicinity.

"(23) The quality of the wheat in the vicinity of the mill during the summer and fall of 1903 was not very good, and made it extremely difficult to procure a high grade of No. 2 wheat.

"(24) The evidence does not disclose that the defendant ever furnished any other wheat for making any further tests, nor does it appear that the plaintiff ever asked to make any further test.

"(25) That at the time of making the last test said mill was capable of producing a barrel of flour of all grades, with not to exceed three per cent. low grade, from four bushels and twenty-four pounds of good, plump, dry milling wheat, cleaned on the receiving separator, weighing sixty-one pounds to the bushel, but the court cannot say whether it had the capacity to produce that quantity and quality of flour from any wheat inferior to that. This finding is not based on any of the tests attempted.

"(26) That, as it has not been determined by an actual test whether the mill was capable of fulfilling the guaranty, the court will make no findings upon the evidence offered by the defendant as to any damage he may have sustained by a breach of the warranty as to the quantity and quality of flour it was capable of producing from a given quantity and quality of wheat, although some evidence was offered for the purpose of sustaining that defense."

"CONCLUSIONS OF LAW.

"(1) That before the plaintiff can recover upon its first cause of action it must appear from the evidence

either that the mill when completed fulfilled the guaranty, or that the defendant waived a compliance therewith.

"(2) That there was no such an acceptance of the mill on the part of the defendant as waived a strict performance of the guaranty.

"(3) That the only way in which it could be determined, according to the contract, whether the mill was capable of fulfilling the guaranty as to the quantity and quality of flour it would produce from a given quantity and quality of wheat was by an actual test.

"(4) That a fair construction of this contract required that this actual test should be made with good, plump, dry No. 2 milling wheat.

"(5) That by attempting to make the test on the wheat furnished by the defendant the plaintiff did not estop itself from denying that it is bound by that test.

"(6) That until a fair test is made, according to the provisions of the contract, it cannot be determined whether or not the mill fulfils the guaranty with respect to the quantity and quality of flour it is capable of producing from a given quantity and quality of wheat.

"(7) That for any defect in the material furnished the defendant's remedy, as provided for in said contract, was to return the defective parts and have them replaced by new ones.

"(8) That the plaintiff is not entitled to recover anything in this case upon its first cause of action.

"(9) That the plaintiff is entitled to recover upon its third cause of action the sum of \$491.34.

"(10) That the defendant is not entitled to recover anything in this action."

Motions for a new trial by both the plaintiff and the defendant were denied. Judgment was rendered pursuant to the conclusions of law, and both parties prosecute error.

T. F. Garver, and G. W. Hurd, for plaintiff in error.

Thompson & King, and E. C. Sweet, for cross-petitioner in error.

The opinion of the court was delivered by

BURCH, J.: The chief controversy is over the meaning of the contract. The plaintiff says that although the contract provides for a mill of a given capacity no test is prescribed by which that capacity is to be ascertained; that an actual test with the kind of wheat described in the contract is not necessary, and that such capacity may be proved by any competent evidence, citing *Kinnard v. Stanley*, 70 Kan. 770, 79 Pac. 661, and *Edward P. Allis Co. v. Columbia Mill Co.*, 65 Fed. 52, 12 C. C. A. 511.

The contract expressly provides that when the machinery is operated so as to meet the requirements of the milling guaranty the defendant shall accept the mill and pay for it. It is a part of the guaranty that the mill will perform according to the guaranty when operated under the plaintiff's own direction, and the defendant is required to furnish wheat, labor and power to operate the mill at its full capacity when the plaintiff is ready to do so. These terms can mean but one thing. Besides the existence of mill machinery which when properly set up shall have a given capacity, there must be an operation of the machinery in such a manner that it will demonstrate its powers.

The contract indicates that the defendant wanted a 200-barrel mill which would be the equivalent in all respects of those of his competitors, and which would make a barrel of flour from four bushels and twenty-four pounds of No. 2 wheat; that he was willing to pay the plaintiff's price for it whenever the mill produced the desired results, but that he wanted to see such results produced before parting with his money. The contract further indicates that the plaintiff, as a manufacturer of mill machinery, undertook to furnish the very kind the defendant needed, and agreed to wait for its pay until an actual working test of the mill

demonstrated a capacity commensurate with the guaranty. So interpreted the contract is fair and just and businesslike and reasonable. Any other interpretation would strain the meaning of words, and would violate the rule relied upon by the plaintiff when discussing other features of the contract—that all of its parts are to be considered in ascertaining the meaning of any particular part. Any other interpretation would also be contrary to the practical construction which the parties themselves have given it by three attempts at a mill-run demonstration. When writing for wheat with which to make a test run and calling the attention of the defendant to the provisions of the contract respecting the matter the plaintiff had no doubt as to what was required of it. To substitute some kind of proof of capacity other than that afforded by an operation of the mill would be to change the contract.

Since the mill must show for itself what it can do the character of grain to be used in making the test is important. The defendant says the special guaranty relating to the quantity and quality of flour to be made from a given number of bushels of wheat is to be considered as if standing alone; that it was written in a printed blank; that the printed clause relating to the kind of wheat to be supplied for a test run should be read solely with reference to the printed guaranty of an equal rating with other mills, and that it has no bearing upon the written guaranty; and his conclusion is that any kind of wheat which will grade No. 2 when cleaned on the receiving separator, even though some of the grains be bleached and shriveled, will satisfy his obligation in respect to material for a test.

This interpretation of the contract appears to have occurred to the defendant after he had provided the wheat for two inconclusive tests. It would kill the effect of the words "good, plump, dry milling" when the contract speaks of wheat to be used in showing a

compliance with the written guaranty, and it would utilize them when it prescribes the character of grain to be forthcoming to prove capacity according to the printed guaranty. To avoid this crux the defendant argues that the printed guaranty is meaningless, although he retained it in the contract after striking out other parts of the printed form.

This court cannot assume that there are no other accessible mills having an equivalent line of machinery, or that the quality, percentage and yield of flour produced by such mills from a given grade, quantity and quality of wheat cannot be ascertained. There is a likelihood at least that such mills exist, and that their owners have proved with perfect accuracy their exact capacity; and it may be that in order to fulfil the printed guaranty the plaintiff's machinery must be able to produce a barrel of flour, with not to exceed three per cent. low grade, from four bushels and twenty pounds of No. 2 wheat.

The clause in which the words referred to occur is a very important one. It is the duty of the court to give effect to every word of the contract if possible, and to construe its written and printed portions together when they do not contradict each other. The obvious sense of this undertaking is that whenever a test run is to be made the defendant must furnish wheat, labor and power to operate the mill at full capacity, and that the wheat furnished must be good, sound, dry milling wheat at all events, whether attention be directed specially to matching some other mill in some particular or to the competency of the machinery to extract from wheat grains a high percentage of flour.

Since this mill has not been operated to prove that it has the capacity called for the condition precedent to payment of the price has not been performed. Since the defendant has not furnished wheat of the kind required to perform the condition he is not in a

Ehrsam v. Jackman.

position to urge that the test made proves the mill to be inadequate. That operation merely showed what the mill will do with bleached and shriveled No. 2 wheat, and the defendant cannot in effect take advantage of his own default.

There is no question in the case of the defendant defeating payment through a wrongful refusal to arrange the preliminaries of a test, or of a recovery by the plaintiff notwithstanding a wrongful refusal to operate the mill under proper conditions.

The plaintiff says that if it requires a high quality of No. 2 wheat to produce a barrel of flour from four bushels and twenty-four pounds the contract should be construed to apply only to wheat of the superior kind. This court has no judicial knowledge of how much flour may be extracted from different grades of wheat. The plaintiff guaranteed that its machinery would produce a barrel of flour, with not to exceed three per cent. low grade, from four bushels and twenty-four pounds of good, plump, dry No. 2 milling wheat, and the court will not assume that it contracted to do an impossibility, or anything unreasonable.

There is nothing before the court to call for its opinion upon the situation of the parties if performance of the strict conditions which they have imposed upon themselves should be impossible, or upon the question whether or not performance by either of them may be excused, or, if excuses may be offered, which ones are valid.

Conceding, but not deciding, that what may be termed secondary evidence of the capacity of the mill might be proper under some circumstances, still the plaintiff is not entitled to recover in this action on the findings of fact. Finding No. 22 relates to a local custom not pleaded as affecting the contract, and hence is outside the issues. There is no finding that the custom was known to either party, and they must be held to have contracted with reference to the law. There-

fore finding No. 25, which described No. 1 wheat, does not show a compliance with the milling guaranty, and no other finding or set of findings is sufficient for that purpose.

Nor is the plaintiff entitled to a new trial under the provisional concession. The facts being found the court can apply the law, and will do so unless an erroneous theory of the law has prejudiced the trial, which does not appear. It is said the court erred in refusing to make additional findings of fact requested by the plaintiff relating to the efficiency and capacity of the mill, but such findings are not printed in the brief or further described, the evidence supposed to support them is not pointed out, and the assignment of error is not argued. Hence the matter will not be considered. No complaint is made that evidence relating to the capacity of the mill was improperly rejected. This being true, the facts found which are within the issues are to be regarded as the facts of the controversy.

The plaintiff claims that the second count of the petition was inserted on the theory that it may recover as in *quantum meruit*, notwithstanding a deviation from the contract. No such theory is discoverable in the count itself. It asks damages as in trover for the conversion of property owned by the plaintiff and to the possession of which the plaintiff was entitled. This cannot be done while at the same time the first count of the petition claims the price of the property on the theory that the plaintiff has parted with title by sale; that the defendant owns it and hence is entitled to its possession. The two theories are inconsistent, and an election was properly required.

The plaintiff says that, the machinery having been accepted and used, the burden was on the defendant to allege and prove that it was not up to the requirements of the contract, and cites *Hoffman v. District of Hampton*, 96 Iowa, 319, 65 N. W. 322, among other decisions, as authority. In that case the court said:

“Parties may well stipulate as to the character and

Ehram v. Jackman.

capacity of apparatus or machinery to be furnished or improvements to be made, and make affirmative proof of performance a condition precedent to the recovery of the contract price." (Page 324.)

The contract under consideration is of the kind there described. Besides, there has been no acceptance of the machinery in the sense that a performance of the guaranty is waived. The defendant was under no obligation to bring about a test of the mill. The plaintiff could do so at once, or delay as long as it saw fit. There is nothing in the contract or in the situation of the parties requiring that the mill lie idle until a compliance with the guaranty is shown, or requiring a forfeiture of the defendant's contract rights upon his setting the machinery in motion. If the plaintiff has not been prejudiced in any way, and there is no claim that it has been, simple use of the mill does not waive the test or shift the burden of proof.

The written and printed portions of the contract relating to the belting should be construed together, and the conclusion of the trial court upon that matter was correct. The plaintiff recovered a judgment upon its third cause of action after proof which it was obliged to make. Upon other matters which occasioned the bulk of the costs both parties asked relief, and both were defeated. Under these circumstances the judgment that each party pay half the costs will not be disturbed.

The judgment of the district court is affirmed. The costs in this court are divided.

All the Justices concurring.

OPINION DENYING A PETITION FOR A REHEARING.

The opinion of the court was delivered by

BURCH, J.: In a petition for a rehearing it is suggested that the first paragraph of the syllabus is broad enough to indicate an approval of the third conclusion

of law made by the trial court. The syllabus is of course based upon the situation of the parties disclosed by the record, and so considered can scarcely be misinterpreted; but to relieve the apprehension of counsel it may be said the court did not feel that it was called upon to determine the correctness of the conclusion referred to.

The parties have not acted under the contract. The contract provides for a test run of the mill, to be made with wheat of a specified quality. The plaintiff has not insisted that the defendant furnish wheat of contract quality for a test. The defendant has not arranged for a test with wheat of that quality. No test of the character prescribed by the contract has been made. The defendant has not waived a test according to the contract. Therefore, the defendant's obligation has not been matured, as the contract requires.

The fourth conclusion of law made by the trial court is correct as applied to the test run which the contract contemplates.

Manifestly the court must here take leave of the controversy. Further discussion of the grading of wheat in the vicinity of the mill in 1903 would be bootless, and the petition for a rehearing is denied.

All the Justices concurring.

Sramek v. Sklenar.

PETER SRAMEK V. LIZZIE SKLENAR.

No. 14,560. (85 Pac. 566.)

SYLLABUS BY THE COURT.

1. PETITION—*Breach of Promise to Marry—Matter in Aggravation of Damages.* In an action to recover damages for breach of a contract to marry it is not error to deny a motion to strike out of the petition evidential facts which form no part of the cause of action, but which are pleaded in aggravation of the damages.
2. ——— *Motion to Strike Out—Discretion of the Court.* Even if such facts are redundant and surplusage, and could be proved without being pleaded, it is within the discretion of the court to strike out or retain them.
3. EVIDENCE—*Seduction—Aggravation of Damages—Breach of Promise.* Evidence tending to show that, after a contract to marry had been made, the man seduced the woman by taking advantage of her plighted love and confidence may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out.

Error from Marion district court; R. L. KING, judge.
Opinion filed April 7, 1906. Affirmed.

STATEMENT.

THIS action was brought by the defendant in error in the district court of Reno county to recover damages from the plaintiff in error for an alleged breach of a contract to marry. After a motion of the defendant to strike out portions of the petition as redundant had been denied, the defendant joined issue by a general denial. The case was tried to a jury, and a verdict for \$5000 damages was returned in favor of the plaintiff. A motion of the defendant for a new trial was denied, and judgment was rendered in accordance with the verdict. The defendant brings the case here for review.

Keller & Dean, for plaintiff in error.

W. H. Carpenter, and *Henry Swan*, for defendant in error.

The opinion of the court was delivered by

SMITH, J.: Six assignments of error are made, of which the first is the refusal of the court to strike out certain portions of the plaintiff's petition which set forth the circumstances and long continuance of the engagement to marry and the seduction of plaintiff, which in themselves do not constitute a cause of action or any part of a cause of action, but which are proper matters of proof for the consideration of the jury by way of aggravation of the damages for the breach of the contract to marry.

"As a general rule, it is not necessary to the plaintiff's right of recovery that the particular circumstances of aggravation should be set out in the declaration, although such matters are not infrequently alleged, and in some cases have been required in order to warrant a recovery." (5 Encyc. Pl. & Pr. 705.)

In *Klopper v. Bromme*, 26 Wis. 372, 378, it was assumed that facts which go in mere aggravation of damages should not be allowed in evidence, unless pleaded, if objection be made on that ground. The general rule, however, does not seem to go that far. The allegation of such facts, instead of being prejudicial, is generally considered, if not a matter of right, as at least highly favorable to the defendant. If the facts pleaded are evidential, but are so remotely connected with the cause of action as to form no part thereof, and, in so far as they pertain to stating a cause of action, are redundant and irrelevant, still it is within the discretion of the court to strike them out or retain them. (*Drake v. National Bank*, 33 Kan. 634, 7 Pac. 219.) Some, if not all, of the facts alleged are evidential upon the issue as to whether or not there was a contract to marry. (*Johnson v. Leggett*, 28 Kan. 590.)

The second and third claims of error relate to the admission of, and the refusal to strike out, the evidence

Sramek v. Sklenar.

of the plaintiff as to the courtship and oft-repeated promise to marry, continuing from 1896 to 1902, when first, it is said, a time was agreed upon for the fulfillment of the contract; also, the evidence as to the seduction of the plaintiff. We have examined this evidence, and find it all admissible for the purpose of establishing the disputed contract or in aggravation of the damages for the alleged breach of the contract. (*Johnson v. Leggett*, *supra*; *Klopfer v. Bromme*, 26 Wis. 372.)

It is urged further that the court erred in refusing to instruct the jury that it should disregard the evidence of the seduction of the plaintiff by the defendant in determining whether or not a contract to marry was entered into. Some limitation upon the application of this evidence might well have been given, but the instruction asked was properly refused. True it is, as contended, that if the defendant promised to marry the plaintiff in consideration of her consent to sexual intercourse no action could be maintained for damages for the breach of such contract, by reason of the immorality and illegality of the consideration. (*Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. 797; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67; *Steinfeld v. Levy*, 16 Abb. Pr., N. S., 26.) On the other hand, it is contended that the seduction was not accomplished in consideration of the promise to marry, but that the barriers of modesty and virtue were overcome long after the contract to marry had been made, by the defendant's taking advantage of the plighted love and confidence of the plaintiff. The jury had a right to consider this evidence, and if they believed the latter contention to be true they might well give it weight in determining the amount of damages to be awarded. They might also properly consider, if they believed plaintiff's evidence, the years of courtship, the years of renewed promises of marriage, and all other cir-

Stark v. Morgan.

cumstances which they found placed the plaintiff in a worse position, or debarred her from other opportunities of marriage. The judgment of the district court is affirmed.

All the Justices concurring.

C. M. STARK *et al.*, as Partners, etc., v. H. M. MORGAN *et al.*

No. 14,561. (85 Pac. 567.)

SYLLABUS BY THE COURT.

1. **MORTGAGES—Not an "Alienation."** A mortgage in this state, being merely security for a debt, conveys no title and is not an "alienation" within the meaning of section 2291 of the Revised Statutes of the United States.
2. ——— **Public Land—Homestead Claimant—Validity.** A mortgage upon government land, made by a claimant holding under the homestead act prior to final proof, for the purpose of procuring money to improve the land, or for any purpose, provided it is not intended thereby to transfer the title in evasion of the statute, is not void nor in violation of the homestead laws.
3. ——— **After-acquired Title—Mortgagor Estopped.** A homestead claimant who executes a mortgage under such circumstances, and afterward procures the title to the land from the government, will be estopped from defeating, by his own act, the enforcement of the lien created by the mortgage. His after-acquired title inures to the benefit of the mortgagee.
4. ——— **Cases Overruled.** The doctrine of *Brewster v. Madden*, 15 Kan. 249, and such portions of the opinion in *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, as follow that case, disapproved.

Error from Graham district court; CHARLES W. SMITH, judge. Opinion filed April 7, 1906. Reversed.

Rex V. Wilcox, for plaintiffs in error.

George W. Jones, for defendants in error.

73 453
177 208

The opinion of the court was delivered by

PORTER, J.: This suit was brought to foreclose certain mortgage liens upon land which, at the time the liens were created, was government land occupied by the defendants under a homestead entry, and before final proof thereon. Defendant Morgan and his wife executed two written agreements, dated February 1, 1892, and November 28, 1892, respectively, which were promises to pay for certain fruit-trees to be planted upon the land in question, and were in effect mortgages upon the land. The agreements were acknowledged and recorded. The answer of the defendants raised the following defense:

“And for a second defense defendants aver and say that said debt is not a lien upon the southeast quarter of section 2, township 8 south, range 25 west, Graham county, Kansas, because they say that at the time of the execution and delivery of the written contract declared upon and the creating of the debt the title of said land was in the United States of America, defendants having made homestead entry upon it and were occupying it under the United States homestead law, and at the time of the execution and delivery of said contract and the creating of the debt they had not made final proof under the United States homestead law, and did not do so until on or about September, 1894.”

A demurrer to this defense was overruled, a trial was had, and the court gave judgment against the defendants for \$1600, the amount of the indebtedness, but denied the lien and ordered plaintiffs' mortgages canceled. Of that part of the judgment denying plaintiffs' lien and directing the cancelation of the mortgages plaintiffs complain.

From the statement it appears that but one question is raised: Are the mortgages valid liens upon defendants' land? The provisions of the homestead act require the applicant at the time the original entry is made to make affidavit “that his entry is made for the

Stark v. Morgan.

purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." (Rev. Stat. U. S. § 2290.) On final proof he is required to make affidavit "that no part of such land has been alienated, except as provided" therein. (Rev. Stat. U. S. § 2291.) The exception mentioned relates to transfers for church, cemetery, school or railroad purposes. Section 2296 provides that no lands acquired under the homestead act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Defendants in error rely upon *Brewster v. Madden*, 15 Kan. 249, and *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97. In the former case the question considered was whether a mortgage given by a preemptor prior to the entry of the lands was void. The preemption act of September 4, 1841, required the claimant prior to his entry to make oath that he had not, "directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself." (Rev. Stat. U. S. § 2262.) It also provided that "any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void." The court, speaking by Mr. Justice Brewer, construed the preemption act to mean that congress intended by this section that when title passed to the preemptor it should pass perfect and unencumbered, and the mortgage was held to be void. This is recognized as the leading case in support of the doctrine announced. We believe it has never been followed except by this court in *Mellison v. Allen*, *supra*. The reasoning of *Brewster v. Madden* has been denied and the case overruled by most of the other courts. That case relied upon the case of *McCue v. Smith*

et al., 9 Minn. 252, 86 Am. Dec. 100, which was decided in 1864, and which was expressly overruled in *Jones et al. v. Tainter et al.*, 15 Minn. 512, decided in 1870, five years before *Brewster v. Madden*. In overruling *McCue v. Smith et al.* the Minnesota court said:

"It is true that in *McCue v. Smith et al.*, 9 Minn. 252, 86 Am. Dec. 100, and in *Woodbury v. Dorman*, 15 Minn. 338, it was held that a mortgage made in pursuance of an agreement such as appears in this case was void in the hands of the original mortgagee, and as against persons claiming under the mortgagee not being *bona fide* purchasers, and unquestionably the court below was justified by those cases in holding the mortgage here void in the hands of Tainter. In the case of *Woodbury v. Dorman* (in which one member of the court dissented), an application was made immediately after the filing of the opinion for a reargument by the appellant, who claimed that this court had fallen into error in holding a mortgage, given under circumstances similar to those presented by this case, void; and although a reargument was denied for reasons peculiar to that case, the majority of the court in denying the same took occasion to express their dissent from the holding in that case, and to announce that they should feel at liberty in future to reexamine the question there determined. The majority of the court think that the question ought not to be passed over in the case at bar, regarding it as one which affects interests of too much importance and extent to permit them to sanction by silence or acquiescence what they deem a mistaken view of the law. In *McCue v. Smith et al.*, which was followed in *Woodbury v. Dorman*, it was held that such mortgage was void under the thirteenth section of the preemption act of September 4, 1841. . . . In the opinion of the majority of this court, a simple agreement, by a person proposing to apply for and enter land under the act of September 4, 1841, to execute a mortgage to secure the payment of money furnished him with which to pay for such land, is not such an agreement as is referred to in the provision just quoted from the preemption act. It is not an agreement by which the title to be acquired—that is to say, the *fee*—should inure, in whole or in part, to the benefit of any person other than the preemptor; on the contrary, the presumption is that a mortgagor in-

Stark v. Morgan.

tends to pay the mortgage debt, and discharge his land from the encumbrance of the mortgage, so that his title *shall not inure* to the benefit of the mortgagee.

. . . But the *result* is not important. The question is, Was there any *contract* or *agreement* by which the preemptor fixed this result? Did the preemptor *contract* or *agree* that the title to be acquired—that is to say, the *fee*—*should inure* to the benefit of another? In other words, Did the preemptor contract or agree to do anything which, when done, would *pass the title*, in whole or in part, to another, so that the preemption would, as to such whole or part, be a mere *conduit* of the title? We are clear that no such contract or agreement is fairly to be inferred from a simple agreement, made before preemption, to secure the whole or a part of the purchase-money by a mortgage upon the premises to be preempted. The mortgage contemplated by such contract, or agreement, is but a security (as this court has often held), and its execution does not have the effect of making the title acquired by the preemptor, to wit, the fee, inure, in whole or in part, to the benefit of another." (Pages 514-516.)

The only other case cited and relied upon in *Brewster v. Madden* is *Warren v. Van Brunt*, 86 U. S. 646, 22 L. Ed. 219. There the question of the validity of a mortgage was not in any way involved. The contract held illegal was one by which the preemptor contracted before final proof to sell an interest in the land, which contract was, of course, in violation of the spirit and letter of the law. The court held that "an entry of the public land by one person in trust for another being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made." (Syllabus.)

The case of *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, was decided in 1883. The opinion in that case is also by Mr. Justice Brewer, and follows and approves *Brewster v. Madden*, *supra*. The land involved was a homestead, and the court refused to decree the specific performance of a contract for the conveyance of an undivided interest in the land made before final proof.

Stark v. Morgan.

The distinction between the provisions of the homestead act and those respecting preemption is pointed out, but the decision is placed squarely upon the policy of the government expressed in the requirement that the occupant shall make oath at the time of final proof that no part of the land has been alienated. "It is true," the court said, "these sections contain no express prohibition on alienation, and no declaration of forfeiture or penalty in case of alienation; and yet the homestead right cannot be perfected, in case of alienation, without perjury by the homesteader." (Page 383.) It was held that the contract, whether absolutely void or not, "is clearly against the will and policy of the government, and so necessarily resting upon perjury that a court of equity will have nothing to do with it." (Page 385.) The case of *McCue v. Smith et al.*, *supra*, was cited again, and relied on.

The supreme court of California, in *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693, had the same question before it in a case involving both the homestead and preemption laws. Stewart occupied the land under the homestead act, and executed a mortgage to Orr for money to pay for the land. After the foreclosure and sale to Orr, and after Orr had taken possession of the land under the sheriff's deed, Stewart commuted the entry under the preemption act and received a certificate of purchase. Orr brought the suit to quiet his title against Stewart. The mortgage was held valid, and plaintiff's title was quieted as against any title defendant had acquired subsequently from the government.

In a later case, decided in 1893 (*Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486), the same court held that a mortgage executed by a preemption claimant before final proof was not a "grant or conveyance" within the preemption statute and was therefore valid. It was held that the mortgagor was estopped from defeating by his own act the lien attempted to be created, and that the mortgage was not void under the homestead

Stark v. Morgan.

act, "unless . . . intended as a mode of transferring the title in evasion of the statute." (Page 521.) The authorities were reviewed, and *McCue v. Smith et al.* referred to as supporting the other view; and it was noted that the Minnesota court had expressly overruled the latter case in *Jones et al. v. Tainter et al.*, 15 Minn. 512; and *Brewster v. Madden* was mentioned as in line with the earlier overruled cases in Minnesota.

When *Brewster v. Madden* was decided it was in accord with the rulings of the commissioner of the general land-office, as well as those of the department of the interior; but in 1882 this department of the government faced about, and Mr. Teller, secretary of the interior, reviewed the former decisions in a careful opinion, and showed their unsoundness. In *Larson v. Weisbecker*, 1 Land Dec. Dept. Int. 409, he used this language:

"I am aware that the former rulings of your office and of this department—following the precedent of an early decision—have held that an outstanding mortgage given by a preemptor upon the lands embraced in his filing defeats his right of entry upon the ground that such mortgage is a contract or agreement by which title to the lands *might* inure to some other person than himself. A careful consideration of this section leads me to a different conclusion, and to the opinion that, unless it shall appear under the rules of law applicable to the construction of contracts or otherwise that the title *shall* inure to another person, it does not debar the right of entry; and that *the mere possibility* that the title *may* so result—as in the case of an ordinary mortgage—is not sufficient to forfeit the claim. . . . The statute under consideration requires from a preemptor, in my opinion, in order to the defeat of his right of entry, a contract *by force of which* title to the land must vest in some other person than himself; and it must appear that *such was his intention* at the time of making it. If, on the contrary, the mortgage was a mere security for money loaned, and the contract does not *necessarily* divert the title from him, it was not a contract or agreement within the meaning of section 2262."

The secretary held that the purpose of the law was to prevent speculative entries. The effect of this decision was limited to the case under consideration and to future cases. Since that time the rulings of the department have uniformly been that a mortgage given in good faith, executed prior to final proof, in no manner violates the provisions of either the preemption or homestead laws. This change in the rulings of the interior department is referred to and commented on by the court in *Wilcox v. John*, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246, in the following language:

"The rule then announced has, we think, been uniformly followed by the department since. It is founded upon sound reasons, and in practice it has not infrequently been of benefit to settlers in negotiating loans to carry them over periods of drought, or of business depression, and should be maintained if not inconsistent with the terms of the statute, as it is of the highest importance that the decisions of the courts in these matters should be in harmony with the rulings of the land department.

"The rule contended for by appellants, whereby a mortgage is held to be interdicted, is founded upon a somewhat forced construction of the words 'grant' and 'conveyance' as used in the statute. By the later, and, as we think, the better-considered cases, it is held that neither a mortgage nor a deed of trust is a grant or a conveyance within the prohibitory clause of the statute." (Page 370.)

In this case the Colorado court referred to *Brewster v. Madden*, 15 Kan. 249, as one of the few cases holding to the contrary view. The supreme court of Montana in a well-considered case has held that a mortgage of a preemption prior to final proof is not a grant or conveyance within the provisions of the preemption act, expressly overruling the former decision of that court in *Bass v. Buker*, 6 Mont. 442, 12 Pac. 922. In the later case (*Norris v. Heald*, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581) the two lines of cases were exhaustively reviewed, and the change in the rulings of the interior department since *Brewster v. Madden*

Stark v. Morgan.

was noted, and the reasoning of Secretary Teller in *Larson v. Weisbecker*, 1 Land Dec. Dept. Int. 409, approved. It was held, however, that "the purpose for which a sum of money may be borrowed becomes material to show that the mortgagor is acting in good faith, and not in collusion with the mortgagee to convey the title, and evade the provisions of the law." (Page 291.)

The case of *Stark et al. v. Duvall et al.*, 7 Okla. 213, 54 Pac. 453, is squarely in point. Plaintiffs in error in that case and in the case at bar are the same persons, the lien being for fruit-trees, and having been created in the same way. The land there was a homestead entry. The opinion reviewed the changes in the rulings of the interior department, and referred to *Brewster v. Madden* and the other cases from this court, but refused to follow them, preferring to adopt the reasoning of the later cases as in accordance with the rulings of the general land department of the government. (See, also, the following cases: *Spiess v. Neuberger and wife*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Celia Lang v. William H. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; *Fuller & Co. v. Hunt*, 48 Iowa, 163; *Howard v. Reckling*, 31 Ore. 161, 49 Pac. 961; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726; *Orr v. Ulyatt*, 23 Nev. 134, 43 Pac. 916; *Mudgett v. Dubuque and Sioux City R. R. Co.*, by Secretary Vilas, 8 Land Dec. Dept. Int. 243, 247; 26 A. & E. Encycl. of L. 411, 412.)

A mortgage in this state is not an alienation, but a mere security for a debt; it creates a lien, but vests no title. (*Chick and others v. Willetts*, 2 Kan. 384; *Kirkwood v. Koester*, 11 Kan. 471; *Hunt v. Bowman*, 62 Kan. 448, 63 Pac. 747; *Railway Co. v. Sharpless*, 62 Kan. 841, 845, 62 Pac. 659.)

It thus appears that *Brewster v. Madden*, 15 Kan. 249, stands opposed to the current of recent authori-

Stark v. Morgan.

ties. When it was decided the principal case upon which it relied had been discredited, and was no longer authority in the Minnesota court. It is itself no longer in harmony with the policy of the department of the government which has to do with public lands. When it was decided it accorded with the rulings of the interior department; and it may be noted that when it was followed in *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, it was expressly stated that the contract declared to be void was against "the will and policy of the government." This was true until the decision by Secretary Teller in *Larson v. Weisbecker*, 1 Land Dec. Dept. Int. 409, and it is apparent that the court's attention was not directed to the then recent change in the rulings of the department, which had occurred the previous year.

In the case at bar the land was held under the homestead law, and something might be argued in favor of upholding these mortgage liens upon the theory that the restrictions in the provisions of the homestead law are less stringent than those in the preemption act. However, the courts as well as the interior department have recognized no distinction between mortgages executed upon land held under the preemption law, when that law was in force, and those held under the homestead law. The purpose of the requirements in both is held to be to prevent speculative entries, and the right of the claimant to execute a valid mortgage upon the land for any legitimate purpose is no longer doubted. There is much force in the suggestion that in cases of this kind the courts should hold in harmony with the policy and will of the government, as announced in the rulings of the land department; and in view of all that has been said we are constrained to hold that the doctrine announced in *Brewster v. Madden*, 15 Kan. 249, and followed in *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, should be disapproved. To do so requires little or no disturbance of any vested rights or rule of property.

Stark v. Morgan.

It is contended that section 2296 of the Revised Statutes of the United States, *supra*, which provides that no land acquired under the provisions of the act shall be liable for any debt contracted prior to the issuance of the patent, will prevent the lien of the mortgages from attaching. This contention has been decided squarely against defendants in error in *Watson v. Voorhees*, 14 Kan. 328, where it was held that congress did not intend by this act to place any restriction on the right of the owner voluntarily to encumber the land. It was there said that "the limitation was on the creditor, and not upon the debtor." (See, also, *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726.)

Since it appears, therefore, that the mortgages in no wise conflict with the provisions of the statute in relation to homestead entries, and that in this state they do not constitute an "alienation," and can in no sense stand in the way of the claimant's honest oath on final proof, they are clearly valid liens. If, however, it should be made to appear that a mortgage given under such circumstances was intended as a means of transferring the title in evasion of the provisions of the homestead act, it would be void; if made in good faith for any other purpose, it is valid.

The principles of after-acquired title and equitable estoppel apply with full force. Defendants in error at the time the liens were created had no title; but it is well settled that in such a case title acquired after the mortgage inures to the benefit of the mortgagee. (*Watkins v. Houck*, 44 Kan. 502, 24 Pac. 361; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Spiess v. Neuberg and wife*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Rauch v. Dech*, 116 Pa. St. 157, 9 Atl. 180, 2 Am. St. Rep. 598, and note; 2 Herm. Estopp. & Res Jud. § 895.)

We hold, therefore, that the mortgages were valid liens upon the land in question, and not in violation of the provisions of the homestead laws; that defendants

Ross v. Eastham.

in error are estopped from defeating the liens attempted to be created by them; and that their after-acquired title inured to the benefit of the mortgagees.

The cause is reversed, and remanded for further proceedings in accordance with these views.

All the Justices concurring.

THE ROSS OIL AND GAS COMPANY V. F. M. EASTHAM
et al., as Partners, etc.

No. 14,563. (85 Pac. 531.)

SYLLABUS BY THE COURT.

1. CORPORATIONS—*Authority of Secretary to Make Contracts.*
A secretary of a corporation cannot ordinarily, without special authority, make contracts which will bind the company.
2. JUDGMENTS—*Presumption on Review.* Where a district court, in a trial without a jury, enters a general judgment, and the record in the case presents two theories upon which the court might have based its conclusions, one proper and the other erroneous, but does not show which theory was followed, this court will presume that the judgment was entered upon the theory which makes it valid.

Error from Allen district court; OSCAR FOUST, judge. Opinion filed April 7, 1906. Affirmed.

Ewing, Gard & Gard, for plaintiff in error.

Campbell & Goshorn, for defendants in error.

The opinion of the court was delivered by

GRAVES, J.: This action was brought to recover for extra work done on a gas-well. The plaintiff in error, a corporation, had a contract with the defendants in error by which the latter were to put down six wells at Humboldt, Kan. Five of the wells were completed. When the sixth well was at the depth where oil-sand was expected a stratum thereof was found, but the

quantity and quality were not satisfactory. Under the direction of the secretary of the plaintiff in error the extra work was done which is involved in this case. It does not appear that the secretary was specially authorized to act for the company in this matter, and for this reason the company denies liability.

At a trial without a jury, in the district court of Allen county, the defendants in error recovered judgment against the company, and it brings the case here for review. No special findings of fact were filed by the court, and the record does not show upon what theory the judgment was based.

It is insisted that the secretary of a corporation cannot bind the company by contracts made for it, unless specially authorized so to do. In this contention we fully agree with the plaintiff in error. It is alleged in the petition, however, that the secretary was also manager and agent of the corporation, so far as this well was concerned, and there is evidence in the case tending to sustain this averment. If the evidence in the case satisfied the court that the secretary acted for the company in this matter, with its knowledge and consent and under circumstances which justified the defendants in error in recognizing him as the authorized representative of the company, or that he was expressly authorized to manage and superintend the well in question, the judgment was proper. The general presumption, which always obtains in support of the judgments of courts having general jurisdiction, requires us to assume that the court so found, and placed its judgment upon such finding.

There is evidence to support such a finding, and as the case comes to us we are unable to say that the evidence is insufficient. The judgment of the district court is affirmed.

All the Justices concurring.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY V. WALTER M. POOLE.

No. 14,564.

SYLLABUS BY THE COURT.

RAILROADS—Live-stock Shipping Contract—Stipulation for Notice of a Claim Construed. A stipulation in a live-stock shipping contract that a written notice of a shipper's claim for damages should be a condition precedent to a recovery for any loss or injury to stock during transportation does not apply to damages such as loss of market or depreciation in the market price of live stock occasioned by the carrier's negligent delay.

Error from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed April 7, 1906. Affirmed. Rehearing allowed May 9, 1906. Reversed on a stipulation October 1, 1906.

William R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error.

Lee Monroe, and E. P. Hotchkiss, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: Walter M. Poole shipped seven car-loads of cattle from Loveland, Kan., to Kansas City, Mo., over the Atchison, Topeka & Santa Fe railroad. The time reasonably required for transportation between the points named is said to be about thirteen hours, but Poole's cattle were on the road about twenty-four hours, and did not arrive until the market for the day was closed, making it necessary to hold them over till the following day, when there was a decline in the market value of such cattle. Poole claimed that negligent delay of the company caused a shrinkage in the value of the cattle during transportation of \$206.98; also that during the time of the detention caused by the delay there was a depreciation in the market value to the extent of \$485.83, and that

Railway Co. v. Poole.

as a result of the detention he was required to make an extra expenditure of \$14.40 for feed. To recover these damages an action was brought by Poole, and the railroad company answered that the shipment was made under a written contract, the terms of which precluded a recovery of damages. The contract provision mainly relied on reads:

"As a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of the delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock-yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages."

No such notice of a claim for damages was in fact given prior to the removal of the cattle, and the question arises whether the failure to give the same bars a recovery. In charging the jury the trial court ruled that the failure to give the notice cut out any recovery for the shrinkage of the cattle during the delayed transportation, but left to the jury to determine what, if any, damages were sustained because of the depreciation in the market price of the cattle by reason of the delay and detention.

It is competent for parties to make contracts limiting a carrier's common-law liability, and stipulations that the shipper shall give notice of injury or loss to

live stock while being carried have been sustained. (*Goggin v. K. P. Rly. Co.*, 12 Kan. 416; *Sprague v. Mo. Pac. Rly. Co.*, 34 Kan. 347; *A. T. & S. F. Rld. Co. v. Temple*, 47 Kan. 7; *W. & W. Rly. Co. v. Koch*, 47 Kan. 753; *Kalina v. Railroad Co.*, 69 Kan. 172, 76 Pac. 438.) Such contracts and the notices required by them must be reasonable. Agreements of this character are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed.

Assuming that the contract in question is valid, the limitation does not fairly cover the loss of a market. It does extend to damages for loss or injury to cattle during the transportation, and hence the trial court excluded a recovery from shrinkage in their condition during shipment. Reference is made to the *Kalina* case as holding that damages for the decline in the market price were not recoverable in the absence of a notice, but it will be seen that the contract there involved provided generally for all loss, damage and detention that might be claimed, and ten days were given in which to present the claim. Here the claim specified in the contract of which notice is to be given is confined to loss or injury to stock during transportation, and the notice was required to be given before the removal of the cattle from the place of the delivery or destination, and before they were slaughtered or intermingled with other stock. A loss of market differs distinctly from a loss or injury to the cattle. Depreciation in the price or the loss of a market is not fairly embraced within the terms of the contract requiring notice of loss or injury to the cattle during transportation. (*Kramer & Co. v. C. M. & St. P. Ry. Co.*, 101 Iowa, 178.)

Obviously it was intended that these cattle should reach their destination on a particular market day, and be sold on arrival. The particular time for the transportation was not specified in the contract, but the

O'Keefe v. Behrens.

character of the shipment and surrounding circumstances, well known to all, required the carrier to transport the cattle with reasonable dispatch. The testimony tends to show an unreasonable delay in shipment, whereby there was a loss of market on the day of arrival, and a consequent loss to the shipper, for which the carrier is liable. The judgment is affirmed.

All the Justices concurring.

WILLIAM O'KEEFE *et al.* v. CHARLES F. BEHRENS *et al.*

No. 14,566. (85 Pac. 555.)

SYLLABUS BY THE COURT.

1. **LIMITATION OF ACTIONS—*Administrator's Sale Void for Want of Notice—Action by Heirs.*** Section 16 of the code of civil procedure (Gen. Stat. 1901, § 4444), requiring actions brought by the heirs of a deceased person for the recovery of real property descending to them but sold by an administrator of the estate of the decedent upon an order of court directing such sale to be commenced within five years after the date of the recording of the deed made in pursuance of the sale, applies to sales which are void for want of notice to the heirs of the proceedings upon which the deed is based.
2. **DESCENTS AND DISTRIBUTIONS—*Rights of Heirs to Possession and Partition.*** Heirs suing for the possession and partition of real estate to which they have acquired title by descent are not required to show, as a condition precedent to recovery, that the land is not subject to appropriation for the payment of the decedent's debts.
3. **PLEADING—*Written Instrument—Denial under Oath.*** An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath.
4. ——— ***Administrator's Deed—Effect of Failure to Deny Execution.*** Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based.

O'Keefe v. Behrens.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 7, 1906. Reversed.

J. B. Ziegler, and S. H. Piper, for plaintiffs in error.

O. P. Ergenbright, and J. B. Tomlinson, for defendants in error; P. O. Jones, of counsel.

The opinion of the court was delivered by

BURCH, J.: John F. Behrens, the owner of the real estate in controversy, died intestate in June, 1890. On January 30, 1896, plaintiff in error O'Keefe placed upon record an administrator's deed of the land to him, regular upon its face, and duly approved, executed and delivered in pursuance of a sale directed to be made by an order of the probate court. In December, 1903, the heirs of the decedent commenced an action of ejectment for the recovery of the land, and on the trial attacked the administrator's deed as void. They claimed that the probate court had no jurisdiction to grant the order of sale because no notice of the hearing of the application to sell had been given (*Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161), and that unless founded upon a valid order of sale the deed could not divest them of their inheritance.

Whether the proof offered was sufficient to establish this claim need not be discussed, and is not decided. For the purposes of the case it will be assumed that no order respecting notice was made, that notice was neither given nor waived, that none of the heirs appeared in the probate proceedings, and hence that the order of sale was void and open to attack in a collateral proceeding. The question still remains whether the action was barred under the provisions of section 16 of the code of civil procedure, which reads as follows:

"Actions for the recovery of real property, or for the determination of any adverse right or interest

therein, can only be brought within the periods herein-after prescribed after the cause of action shall have accrued, and at no time thereafter: . . .

"*Second*, An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale." (Gen. Stat. 1901, § 4444.)

The question suggested was fairly decided in the case of *Young v. Walker*, 26 Kan. 242. The action there under consideration was one of ejectment against a claimant under an administrator's deed. There were defects in the proceedings upon which the deed was founded. The court held that the statute cited applied, and in the course of the opinion said:

"We shall assume for the purposes of the case that, except for the statute of limitations, the administrator's deed would be void. We shall assume for the purposes of the case that the irregularities in the proceedings of the probate court, and of the administrator, are sufficient to render the administrator's deed void in any action or proceeding that might have been commenced before the statute of limitations had completely run, and this whether the deed was attacked directly or collaterally; and with such assumptions we shall proceed to a discussion of the question whether the statute of limitations has in fact so run as to make the deed valid. Of course the statute of limitations must have some use. It was not enacted for the purpose of curing administrators' deeds which were already good. It was really enacted for the purpose of curing administrators' deeds which would otherwise be void. . . . If everything was regular, there would be no need of any statute of limitations. If the administrator's deed was valid without such statute, then there would be no need of the statute. Therefore it is evident that the statute was enacted for the purpose of curing administrators' deeds which would otherwise be void." (Pages 249, 251.)

This decision has never been overruled. In the case of *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116, a guardian's deed was attacked in an action of ejectment. The defects in the proceedings supporting the instrument were held to be mere irregularities, the usual presumptions in favor of proceedings within the jurisdiction of the probate court were indulged, and it was decided that the deed was not vulnerable to collateral attack. The opinion was delivered by the justice who expressed the conclusion of the court in *Young v. Walker*, *supra*. That decision was not referred to, but, apparently forgetful of what had been written in the earlier case, the learned judge made incidental use of language from which it might be inferred that the statute of limitations in question would not apply to void sales.

Some inconclusive references to the statute appear in other decisions, and in order that all doubt regarding the matter may be removed a restatement of the court's views, and of the reasons for entertaining them, may be proper.

The probate business of this state has been exposed to administration by unskilled hands. The office is political, the terms short, and ignorance, inexperience, inefficiency and carelessness are likely to register their effects upon the devolution of titles accomplished through probate proceedings. Upon the death of a resident of a county his estate must be settled. His debts must be paid, and his real estate liable for the satisfaction of debts must be sold for that purpose, in the absence of other available assets. In justice to all persons interested land ought to be sold to the highest possible advantage, and this cannot be done unless purchasers have confidence in the security of their titles. Men will not pay for land upon which to found homes unless they are to be protected in the undisturbed enjoyment of the fruits of their enterprise. After a fair purchase has been made upon the faith

of an order of sale granted by a court of competent authority, and the purchase-money has been irretrievably distributed among creditors, it would result in the rankest kind of injustice to allow heirs to remain silent for years and then, prompted by some fortuitous circumstance, like the discovery of oil or other mineral in the vicinity of the premises, to claim them. The state itself, as a matter of public policy, is interested in the repose and stability of land titles; in the development and improvement of landed property, which doubtful tenures prohibit; and in the repression of vexatious and speculative litigation. These considerations apply as well to sales made without notice as to those of which the heirs have been legally informed.

A title which is not infirm needs no statute of limitations for its protection. If there be no defects, remedial legislation is superfluous. All the defects which vitiate probate sales must range themselves with one or the other of two classes—those which go to the jurisdiction of the court, and those which are not jurisdictional. The latter class does not render sales void or subject to attack except in a direct manner, by appeal or by statutory proceedings to reverse, vacate, or modify. The time limitations upon such proceedings are found in the provisions of the statutes fixing the period within which appeals may be taken or proceedings in error and the like may be commenced. When such time has elapsed, no matter what the irregularities may be, for all purposes of the law the proceedings are valid, and ejectment against the purchaser will not lie. There is, therefore, no room for the beneficial application of the statute cited except to forefend collateral attacks. Ejectment is a collateral proceeding. (*Fleming v. Bale*, 23 Kan. 88; *Mastin v. Gray*, 19 Kan. 458, 466, 467, 27 Am. Rep. 149; *Priest v. Robinson*, 64 Kan. 416, 420, 67 Pac. 850.) The basis of the action must of necessity be the absence of some fact essential to probate jurisdic-

tion. The language of the statute, which is plain and unambiguous, clearly applies to such an action, and to limit its operation to sales made upon voidable orders only is to make an unauthorized and unwarranted interpolation.

It is to be conceded that whatever is placed of record must be capable of description as an administrator's deed or the statute will not be set in motion. It must also be tested by what appears upon its face. But if it can be said from what appears there that it fairly complies with the law it will be sufficient, although informal and irregular. Such deed must also be made pursuant to an order or judgment directing a sale. The court must have acted, and what it did must be of a character to make it identifiable as an order or judgment. A forged order would not be an order of a court any more than a forged deed would be a deed made pursuant to an order or judgment. If upon appeal an order of sale should be set aside, or if the enforcement of the order should be permanently enjoined, no deed could be made pursuant to it. Other circumstances might be suggested under which something in the form of an order or a deed would not be such. But after an administrator's deed made pursuant to an order or judgment of the proper court directing a sale has been placed of record heirs must sue to recover the property within five years, or be deemed to have admitted the validity of the sale and conveyance, whether they had notice of the proceedings or not. After the expiration of that time the purchaser cannot be called upon to vindicate their legality.

Statutes of this character are common, and usually receive the interpretation here indicated. In Mississippi a statute was passed barring actions brought on account of the invalidity of executors', administrators' and guardians' sales made under decrees of probate courts prior to October 1, 1871, and barring actions directed against such sales made under decrees of the

chancery court, to which probate jurisdiction was transferred, subsequently to that time. The period within which such actions might be brought was limited to one year, but the protection of the act was confined to sales made in good faith upon which the purchase-money had been paid. In construing this statute, in a case in which the invalidity complained of was in part want of notice to heirs, the court said:

"The manifest purpose of the statute was remedial. It is framed on the idea of giving repose and confidence to titles derived from probate sales made prior to the 1st of October, 1871, and to the same kind of sales made by executors, administrators and guardians subsequently by the chancery court. The evil was that, because of the negligence and carelessness which experience had shown marked the history of the probate court, it was almost the exception to conform to the statutory directions, in the exercise of that special and limited jurisdiction for the sale of the real estate of decedents by their personal representatives, and of minors by their guardians; and under the decisions applicable to that sort of jurisdiction the titles of the purchasers were invalid. Persons who had in good faith paid their money, years afterward lost their lands, and the heirs recovered the property oftentimes disencumbered of debts.

"The statute proposed to cure the evil by applying a short limitation where the sale was free from fraud, and the purchaser in good faith had paid his money; so that if the purchaser lost his land, he might indemnify himself in some mode or other. . . . Mrs. Faler, having been in possession for more than a year after the 1st of October, 1871, before suit was brought, can claim the benefit of the bar, unless the further position taken by counsel be true, that the statute does not apply if the sale be void for some defect which makes the decree a nullity, such as want of notice to the heirs. It is said the invalidity meant is some irregularity occurring after decree. If the court had jurisdiction of the subject-matter and parties, the decree of sale is valid, and the sale itself would stand on the same footing as other judicial sales, and could not be impeached collaterally for mere irregularities.

"The statute is remedial and curative, has its origin

in that policy, and, if the words will admit of it, should receive that construction which will accomplish the end aimed at. It was meant to cure all defects in the sale, no matter from what cause, whether before or after decree, unless the heir brought his action within the time to contest and show its invalidity. The vendee enters claiming under the judicial proceedings and the administrator's deed. Though the sale be void, he is in under color and claim of title, and the statute does no more than to protect and perfect his imperfect right, after the expiration of a year from the time the right to bring suit arose." (*Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 679, 682.)

In a subsequent decision the court commented upon the same statute as follows:

"It originated in the known fact that a very large proportion of the sales of property by virtue of the orders of probate courts was void, from various causes; and, as insecurity of titles to property is a great public evil, it was determined to provide a short statute of limitations applicable to all cases falling within the existing evil. . . . This section applies to all sales of the class mentioned which are invalid, no matter on what ground. Every sale which is included in the evil intended to be remedied is embraced. . . . The section does not involve the idea of a legally appointed and qualified administrator, executor or guardian who made a sale by virtue of the order of any probate court. The language is, 'any administrator, executor or guardian by virtue of the order of any probate court.' It is not *any legally appointed and qualified* administrator, executor or guardian; and to hold that the statute applies only to sales by a legally appointed and duly qualified one is to interpolate the section, and to circumscribe its beneficial operation within narrower limits than the evil to be remedied, and than, it is to be justly assumed, the legislature intended. . . . The statute was passed with direct reference to the known condition of things, and to meet that, and not upon the view that proceedings in the probate courts were what they should have been under the constitution and laws." (*Hall v. Wells*, 54 Miss. 289, 297, 299.)

In the case of *Vancleave v. Milliken*, 13 Ind. 105, an

administrator's deed was attacked as void for want of notice to the heirs in an action to recover possession of the land. The court held a statute of limitations identical in effect with section 16 of the code (Gen. Stat. 1901, § 4444) of this state to be applicable, and adopted the reasoning employed in *Pillow v. Roberts*, 54 U. S. 472, 14 L. Ed. 228, saying:

"It is held by the court, in that case, that such statutes are statutes of repose, and that it is not necessary that he who claims their protection should have a good title; that such statutes would be of little use if they protect those only who could otherwise show an indefeasible title to the land; and, hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world." (Page 107.)

In the case of *White et al. v. Clawson et al.*, 79 Ind. 188, the statute was applied to a void guardian's sale. The court said:

"Nor did the averment that the guardian's sale was void add anything to it. The statute upon which the defense was based is a statute of repose, and it is not necessary that a person shall have a good title to invoke its aid. Such persons do not need it. It is only those who cannot assert a good title. It protects those who hold under void sales." (Page 192.)

In the case of *Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653, the court had under consideration a three-year statute of limitations similar to that of this state. The opinion reads:

"There is nothing in the policy or language of the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts, and in view of that policy, merely, there can be no distinction between sales which may be termed void for the want of jurisdiction, and those which are voidable only. . . . We think the statute applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act." (Pages 520, 521.)

—

The syllabus of the case of *Ganahl v. Soher*, 68 Cal. 95, 8 Pac. 650, reads:

"An action by the heirs of a deceased intestate to recover real property sold by a person acting as his administrator under the provisions of the probate act, and by order of the probate court, must be brought within three years next after the sale, or within three years after they attain majority, notwithstanding such sale was void because of the invalidity of the appointment of the acting administrator."

In the case of *Scott v. Hickox et al.*, 7 Ohio St. 88, persons who had not been made parties to a foreclosure suit undertook to recover the land in controversy in the face of a seven-year statute protecting purchasers at judicial sales. The court said:

"On the face of the section there is no absurdity, which might imperiously require a construction giving it a meaning different from its literal import; and the only argument by which we are urged to do so is derived from supposed cases of hardship which might arise under its operation if literally construed. That such cases of hardship might possibly occur is readily admitted. But the same may be said of the operation of all statutes of limitation. It is in the nature of all such statutes that it should be so. And they all proceed upon the policy of compelling either a vigilant and timely prosecution of the rights of parties, or the sacrifice of those rights to the public repose. Where statutes of limitation are, on their face, free from ambiguity, it is now the established policy of courts to avoid giving them any other construction than that which their words demand. (Angell on Limitations, 24.)

"And, on the whole, looking at the examples of like legislation to be found in other states, we are not prepared to say but that the general assembly, in the enactment of this statute, appreciating the advantages of public repose, and the evils of insecurity of land titles, may have intended to express all it has expressed, notwithstanding the cases of individual hardship to which its operation might possibly give rise.

"But, it is said, neither the plaintiff nor those under whom he claims have had their day in court, and therefore he ought not to be barred. This would be

a valid objection if the defendant were setting up the decree as an estoppel; but as against a plea of this statute it cannot avail, for the objection would lie equally against all pleas of any statute of limitation, and effectually prevent its operation." (Page 94.)

(See, also, *Holmes v. Beal*, 63 Mass. 223; *Kammerer v. Morlock*, 125 Mich. 320, 84 N. W. 319; *Cheesebrough v. Parker*, 25 Kan. 566.)

Although length of years may not give jurisdiction or, in a certain sense, make good that which is void (*Foreman v. Carter*, 9 Kan. 674, 678), an act of the legislature may, out of consideration for the public welfare, oblige interested persons to assert their rights within a limited time or forever hold their peace. The power of the legislature to enact a statute of this character is included in the general power to fix periods within which actions may be brought. On the score of reasonableness it may be observed that the practical protection to heirs afforded by a probate court order and a public record of the administrator's deed for five years is much greater than that secured by a notice published for a brief period in a newspaper, which step at the outset would have conferred jurisdiction. In many states proceedings for the sale of a decedent's lands to pay debts are treated as proceedings *in rem*, and notice to heirs may be dispensed with altogether. Generally heirs will know something of steps taken to settle the estate of their ancestor, and it cannot be unjust to require them to press objections at an early date or forfeit the right to do so. From the foregoing it follows that the court erred in admitting evidence of the invalidity of the defendant's deed.

Immediately upon the death of the ancestor title to his real estate descends to his heirs, subject only to appropriation for the payment of debts. (*Black v. Elliott*, 63 Kan. 211, 215, 65 Pac. 215, 88 Am. St. Rep. 239.) They are entitled to possession, and may require partition at once. Letters of administration may not be taken out for a long period of time, or not

at all. Much time may elapse before claims are presented or established, or before it may be known that the personal assets are insufficient. During such periods they are entitled to the separate enjoyment of their several portions of the estate, and may proceed to enforce their rights unless some special state of facts should make it unjust or improper that they should do so. General creditors are not proper parties to partition proceedings at all, and the administrator should not be joined unless under exceptional circumstances. (*Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245.) If after partition the administrator should require the land or some portion of it for the payment of debts, it may then be sold. (*Sample v. Sample*, 34 Kan. 73, 77, 8 Pac. 248.) Therefore it was not necessary that the heirs as a condition of recovery should either plead or prove that the decedent's estate had been settled, or that no debts existed for the payment of which the land might afterward be appropriated.

The allegation of the defendants' answer that they are the owners in fee of the premises in controversy "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath; and a failure to deny the execution of an administrator's deed under oath does not admit the validity of the court proceedings upon which it is based. It has only the *prima facie* effect which the statute gives.

For the error in allowing the administrator's deed to be impeached the judgment of the district court is reversed, and the cause remanded.

GREENE, MASON, SMITH, PORTER, GRAVES, JJ., concurring.

JOHNSTON, C. J. (dissenting): Although not free from doubt, I incline to the view that the statute of limitations does not apply to a void sale. To give the probate court jurisdiction to order a sale of land by

an administrator, notice to the heirs is essential. (*Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161; *Rogers v. Clemmans*, 26 Kan. 522; *C. K. & N. Rly. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988.) A sale without jurisdiction is a nullity, and the purchaser acquires no title. (*Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503.) An absolutely void sale and deed never start the statute of limitations to running. (*Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Carithers v. Weaver*, 7 Kan. 110, 123; *Hall's Heirs v. Dodge*, 18 Kan. 277; *Duffitt v. Tuhan*, 28 Kan. 292; *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712.)

The statute of limitations invoked applies to executors', administrators' or guardians' sales upon an order or judgment directing such sales. It can have no application if there is no order or judgment directing such sales. If there is an entire absence of jurisdiction in the court to order a sale then there is no sale, and hence no room for the application of the statute. If the sale and deed are absolute nullities it is difficult to understand how they can be cured by a statute of limitations—how lapse of time alone can make something out of nothing. It may be that such a deed, in connection with adverse possession, would start the statute of limitations which would ultimately bar the heirs, as some of the cited cases hold; but a sale which is void for want of jurisdiction, and which conveys no title to a purchaser, does not set the statute in motion.

The sale in this instance was no better than if the land of third persons had been embraced in the order of sale and deed. The language of the opinion in *Young v. Walker*, 26 Kan. 242, sanctions the view that the statute of limitations applies to a void deed, but in that case there was a notice, and therefore no want of jurisdiction. The proceedings were irregular, and the deed voidable, but it could not be regarded as a nullity. It is true that some plausible arguments have been advanced to sustain the position of the court, and

Railway Co. v. Taylor.

quite a number of authorities have been cited which tend to support that view. Several of those cases, it will be observed, were treating of voidable, rather than void, sales; and several of the decisions were rested on the fact that there was adverse possession in connection with the irregular proceedings. The supreme court of California, for instance, applies the statute of limitations to void probate sales, and yet, in *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635, it was held that if no possession is taken by the purchaser at a void probate sale the statute of limitations will not affect the question of title or confer title upon the purchaser, but that the title will still remain in the heirs and their grantees.

As tending to sustain the view that the statute of limitations does not apply to probate sales which are mere nullities, I cite *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Pursley v. Hayes*, 22 Iowa, 11, 26, 92 Am. Dec. 350; *Good v. Norley*, 28 Iowa, 188; *Boyles v. Boyles*, 37 Iowa, 592; *Chadbourne v. Rackliff*, 30 Me. 350.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
V. FLORELLA TAYLOR.

No. 14,572. (85 Pac. 528.)

SYLLABUS BY THE COURT.

1. **RAILROADS—Injury to Licensees.** A person while upon premises occupied and controlled by an elevator company, with its consent and for the purpose of transacting business with it, is not a trespasser as to a railway company that owns the land upon which the elevator building stands.
2. ——— **Contributory Negligence.** When a railway company negligently inflicts injuries upon a person situated as above stated, while such person is exercising ordinary care, it cannot avoid liability therefor on the plea of contributory negligence.

Railway Co. v. Taylor.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 7, 1906. Affirmed.

John Madden, and *W. W. Brown*, for plaintiff in error.

Osborn & Osborn, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: The Missouri, Kansas & Texas Railway Company, while placing a car of grain on its switch-track, at an elevator in Coffeyville, Kan., knocked a grain chute down, which fell upon James W. Taylor and injured him so that he died. His widow sued the company for damages, and recovered a judgment in the district court of Montgomery county for \$3000. The defendant brings the case here for review. A demurrer to the evidence was overruled,* and, the defendant having no testimony, the case went to the jury on the evidence of the plaintiff alone.

The plaintiff in error has assigned several errors, but its argument is confined almost entirely to a failure of proof, and contributory negligence.

The facts necessary to an understanding of the case are in substance as follow: The Rea-Patterson Milling Company owns the elevator, and the railway company is the owner of a switch-track upon which cars loaded with grain may be taken to the elevator to be unloaded. When a loaded car is run up to the elevator it is the duty of the milling company to see that it is unloaded. It does not appear from the evidence whether the elevator building occupies ground belonging to the railway company or not, but it may be inferred from the averments of the petition, which should perhaps be considered as admissions of the plaintiff equivalent to proof, that it stands upon the defendant's right of way, the elevator company having permission to use all the ground necessary for the purposes of its business. The elevator stands upon a foundation wall

which is strengthened with brick piers, about three feet across at the ground and eighteen inches at the top, and which extend from eighteen inches to two feet out from the wall of the building.

The deceased prior to his death had been for about two months in the habit of coming to the elevator and assisting the men engaged in unloading wheat by sweeping out the cars, for which he received whatever grain he might find, the amount of which ranged in quantity from a bucketful to a half-bushel to the car. At the time of the injury he was engaged with an employee of the elevator company in unloading a car. While so employed it became necessary to move the car to permit the placing of another. While this was being done the deceased was requested to get off of the car, which he did. After getting out he stood against the elevator, between it and the switch-track, and west of, and near, one of the brick piers to the foundation wall. While so situated he would be about three feet from a car passing on the switch-track. The loaded car, which was being pushed in on the switch-track, had a heavy iron step hanging under it, which was bent out of proper position so that it extended several inches beyond the car. The car was run down to the elevator at a speed of about ten miles an hour, and as it passed the elevator this step struck the chute and knocked it over against and upon the deceased, whereby he was killed.

It is contended that the deceased was a trespasser upon the defendant's premises, and that as the injury was not inflicted wantonly there can be no recovery. It appears that he was standing at the time of the injury within the line of the foundation walls of the elevator, and on ground which the elevator company occupied and controlled. He was there by permission of the managers of that company, for the purpose of performing duties in which both were interested, the company being interested in having the car cleaned and

Railway Co. v. Taylor.

the deceased in securing the grain therefor. Under ordinary circumstances he was in a place of perfect security. He had no reason to suspect danger. He was rightfully there.

The jury returned special findings of fact, among which were the following:

"Ques. Was James W. Taylor at the time of the injury a trespasser on the ground that he was occupying at the time that he was injured? Ans. No.

"Q. State from whom he obtained a right to occupy the ground. A. Rea-Patterson Milling Company's foreman."

Under the facts shown we do not think the deceased can fairly be held to have been a trespasser, but if we had any doubt upon the subject these findings of the jury would place it at rest.

It is also contended that the deceased was guilty of contributory negligence. This claim is based largely upon the idea that he was a trespasser; aside from this it is urged that the deceased, by the exercise of proper diligence, could have seen the projecting step and moved to a place of safety. We do not understand it to be the duty of a person, when rightfully in a place, which under ordinary circumstances is safe, to anticipate danger which arises from the negligence of another. Ordinary care to avoid ordinary or known danger is the extent of vigilance required. Upon this subject the jury returned the following special findings:

"Ques. Could Taylor by the exercise of ordinary prudence have seen that there was danger in placing himself between the cars and the wall of the elevator? Ans. No.

"Q. Could Taylor at the time he saw the train approaching him have gone to the west side of the elevator and been safe from danger? A. No."

Ordinary care did not require the deceased to anticipate that the defendant would run a car upon this switch-track at a high rate of speed past the chute, between which and the car there was known to be a

 Railway Co. v. Dorr.

space of only a very few inches, without first examining to see if any obstacles existed. He was not bound to act upon a supposition that the chute near which he was standing was about to be negligently torn to pieces and thrown upon him. We think this claim of contributory negligence is not tenable.

The other errors complained of relate to the instructions of the court, but the foregoing conclusions practically dispose of these questions also. We have examined each of these instructions, and are unable to find that any of them is erroneous. The judgment of the district court is affirmed.

All the Justices concurring.

THE MISSOURI PACIFIC RAILWAY COMPANY V.
RICHARD N. DORR.

No. 14,573. (85 Pac. 533.)

SYLLABUS BY THE COURT.

1. **RAILROADS—Injury to Employee—Defective Appliance—Notice.** Before an employee of a railroad company can recover from the company for injuries resulting from a defective appliance on a locomotive, of which defect the railroad company had no actual knowledge, he must show that it had existed for such a length of time that the company should have discovered and remedied it.
2. **JURY AND JURORS—Special Finding Too Indefinite.** There was a finding by the jury that the injury in question would not have occurred but for the defect, and that the company had no actual knowledge of its existence. They also found, in response to a question as to the duration of the defect, that it had existed "for some time previous to the accident." *Held*, that the latter finding is too indefinite to support a recovery.
3. ——— **Second Finding Also Indefinite—Presumption on Review—Waiver.** At the instance of the defendant the jury were required to make a more definite answer to the question, but the second answer was no more specific than the

Railway Co. v. Dorr.

first, and, as the second effort to obtain a specific answer had failed, it is not to be presumed that a better result would have been obtained by still other efforts; nor did the defendant waive its right to object to the finding by failing to request the court to have the effort repeated.

4. ——— *Finding and Evidence.* A finding of a jury upon a specific and controlling question must be deemed to be as full and definite an answer as the testimony in the case will warrant.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed April 7, 1906. Reversed.

J. H. Richards, and C. E. Benton, for plaintiff in error; Smyth & Helm, of counsel.

Houston & Brooks, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: Richard N. Dorr was the head brakeman on a freight-train of the Missouri Pacific Railway Company. On his fourth trip over the line he fell from the steps of the locomotive and the wheels passed over and crushed his legs, making it necessary to amputate one of them above, and one below, the knee. He brought this action, alleging that the injury was due to the negligence of the railway company. In his testimony he related the circumstances of the unfortunate occurrence, saying substantially that he was riding on the engine, and as the station of Freeport was approached it was suggested to him that he make ready to get off, which he proceeded to do; that he grasped the handhold of the tender and reached for the handhold of the cab at the opposite side of the passageway, and, it being considerably lower than the other handhold, he leaned over, and just as he was about to catch it there was a jar of the engine which threw him off his balance; and that he then placed his foot on the lower step, which, being defective, tilted him off, his handhold broke loose, he fell to the ground, and rolled under the wheels, receiving the injuries

mentioned. In his petition the negligence imputed to the railway company was the sudden checking of the train, the improper position of the handholds, the defective step, and the condition of the ground upon which he fell, causing him to roll toward the track. The railway company alleged, and offered testimony tending to show, that the step was not defective, and its condition was the main point in dispute between the parties. It was insisted by the company that in any event Dorr knew of the existing conditions, and that his own negligence contributed to the injury. The trial resulted in a verdict for Dorr, and the jury awarded him damages in the sum of \$35,000. There was no claim that the injury was malicious, wilful, or wanton, and hence no part of this exceptionally large award was exemplary damages.

It is earnestly contended that the evidence does not prove the alleged negligence of the railway company, and it is also argued that it affirmatively shows that the injury was due to a want of care on the part of Dorr. Of this branch of the case it may be said that in some respects the testimony is not satisfactory, but it cannot be held that the finding that the company was negligent is without support, nor would the court be justified in saying, as a matter of law, that a recovery by Dorr was barred by his own negligence.

The railway company insists that it is entitled to judgment on the findings, claiming that they in effect acquit it of the charge of negligence. It appears from the evidence and the findings that the liability of the railway company is based principally upon its negligence in maintaining a defective step. To question No. 18, which was, "If you find that said step was out of repair, state in answer to this whether you find plaintiff would have been injured if said step had not been out of repair," the jury answered, "No." To hold the company for injuries to an employee because of defective machinery or appliances it is necessary

that the company should have had knowledge of the defect, or that it ought to have had such knowledge by the use of ordinary care. There was a finding by the jury that the step on the engine was out of repair at the time of the injury, and in answer to another question as to the nature of the defect the jury answered: "The stirrup was bent up in the center at the bottom—bolt was loose, and flanges broken." To the special question, "What person or persons in the employ of the defendant are shown by the evidence to have had notice prior to the accident in question that said step was out of repair?" the jury answered, "No one." The special interrogatory, "If you answer question No. 13 in the affirmative, state for how long a time said step had been out of repair," was answered by the jury, "For some time." The railway company moved the court to require the jury to answer the question more definitely, and the judge stated, "I presume they are entitled to a more definite answer to that, as to how many days or weeks," and allowed the motion. Later the jury returned with the enlarged answer, "For some time previous to the accident." These findings do not warrant a recovery. Whether the defect existed for such a length of time as to charge the railway company with notice of the defect was an important consideration. Notice or knowledge cannot be presumed unless the duration and character of the defect were such as should have been discovered by the railway company by the exercise of ordinary care and diligence. In *Harter v. A. T. & S. F. Rld. Co.*, 55 Kan. 250, 38 Pac. 778, it appeared that an injury to an employee was caused by a defect in a railway-track. The court remarked:

"This, however, is not enough to warrant a recovery against the defendant. There must be evidence fairly tending to show either that the defendant knew of the existence of the defect, or that, in the exercise of reasonable and ordinary care and diligence, the defect could have been discovered before the accident." (Page 258.)

(See, also, *A. T. & S. F. Rld. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; *A. T. & S. F. Rld. Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411; *Carruthers v. C. R. I. & P. Rly. Co.*, 55 Kan. 600, 40 Pac. 915; *Railroad Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Railroad Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953.)

It has been found that Dorr would not have been hurt but for the defective step; that none of the employees of the railroad company knew of the defect; and that the step had been out of repair "for some time previous to the accident." Was it out of repair long enough to charge the railroad company with constructive notice of the defect? How long a period is "some time"? In the Century Dictionary the word "some" is defined as "a certain indefinite or indeterminate quantity or part of; more or less. Often so used as to denote a small quantity or a deficiency." The definition given in Webster's International Dictionary is: "Consisting of a greater or less portion or sum; composed of a quantity or number which is not stated; used to express an indefinite quantity or number"; and, also, "not much; a little."

In *Lewis v. Jones*, 17 Pa. St. 262, 55 Am. Dec. 550, a witness had testified about the purchase of "some hay" and "some grain" to feed stock, and the court was asked to base an instruction thereon, which was refused. In reviewing the case it was said that "'some' is a term too uncertain in its signification to sustain a verdict for any definite amount. It may mean a single ounce, or 10,000 tons—a single quart, or 20,000 bushels." (Page 267.) In the same connection it was said that "nothing can more justly impair confidence in the administration of justice than the practice of encouraging, or even permitting, a jury to find facts of which there is no evidence." (Page 267.) In *Marq., Hought. & Ont. R. R. Co. v. Spear*, 44 Mich. 169, 6 N. W. 203, 38 Am. Rep. 242, the court, in speaking of a promise to repair an engine "some time," said that

Railway Co. v. Dorr.

"the promise was wholly indefinite." (Page 172.) In *City of Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115, there was an instruction given in a personal-injury case to the effect that if the city permitted a defect in the street to continue for a "considerable length of time," which rendered it unsafe and dangerous, a liability would arise, and it was held that a "considerable length of time" was so indefinite as to form no proper test for the guidance of the jury. (Page 312.) In *St. Louis Paper-box Co. v. J. C. Hubinger Bros. Co.*, 100 Fed. 595, 40 C. C. A. 577, the court had before it a contract for the sale of a large number of articles, and there was a provision in it that if the vendee should receive "some" that were not up to sample he should return them to the vendor, who would replace them, and the court interpreted the word "some," as used in the contract, to mean "a small or inconsiderable number." To the same effect is *Chase v. City of Cleveland*, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843. In *Railroad Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953, where the question was whether a certain hole had existed such a length of time that the railway company should have known of it, Chief Justice Doster discussed the matter of time. Among other things he said:

"What is meant by a 'considerable time,' as related to the duration of a defect in railroad-tracks which will charge the company with knowledge? Suppose the jury had found in plain terms: 'The hole did not exist for a considerable time.' Who would have been the wiser as to whether it had existed long enough to enable the company's responsible agents to discover and repair it? Such a finding would have been too indefinite to aid in the determination of the disputed question." (Page 245.)

"Some time" is equally as indefinite as a "considerable time," and certainly it is not a longer time. It is evident that the jury were unable to find from the evidence what length of time the defect did exist, and

upon what basis could they have found that it did exist such a length of time that it should have been discovered and remedied by the railroad company? The finding is the equivalent of an answer that "the step was out of repair before the accident, but the length of time we do not know." The jury were pressed for a specific answer to the question, but their second attempt added words but not definiteness to the answer. After the second effort to obtain a definite answer to the question had failed there was no good reason to expect anything more explicit from the jury on the testimony submitted, and therefore no reason why the court should have been asked to send the jury back for a better answer.

It is argued that the necessary facts are presumably found in the general verdict. The general verdict had no other or better support than the special finding. The question was specific; it was controlling. A definite answer was required, and it must be presumed that the jury made as full and as definite an answer as the testimony would warrant. How, then, can it be said that the general verdict helps out the special finding? The general rule is that the general verdict yields to the special findings. The purpose, in part, of special findings is to explain and test the correctness of the general verdict. Applying this test, it appears that the jury must have misunderstood or misapplied the law as to constructive notice of the defective step. The court, in effect, instructed that the company was not chargeable with constructive notice, "unless the defects were of such a nature, or had existed for such a length of time, that they should have been discovered and remedied by the defendant." The jury's answer as to the length of time was no more than a conjecture. If they could not approximate the duration of the defect, they could not intelligently find that it had existed so long that it should have been discovered and remedied by the railroad company. As was said in *Railroad Co. v.*

The State v. Tibbits.

Tindall, 57 Kan. 719, 48 Pac. 12, "a finding of negligence cannot rest on mere conjecture." (Page 723.)

On account of this finding the verdict is set aside, the judgment reversed, and the cause remanded for a new trial.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel. Otis E. Hungate, as County Attorney, etc.*, v. W. M. TIBBITS *et al.*

No. 14,577. (85 Pac. 526.)

SYLLABUS BY THE COURT.

CONSTITUTIONAL LAW — *Statute Relating to Injunctions Held Valid.* Chapter 334 of the Laws of 1905, amending section 4700 of the General Statutes of 1901 (one of the sections of article 12 of the code relating to injunctions), is not multifarious because it deals with injunctions in respect to such diverse matters as taxation, improvident public contracts, and nuisances.

Error from Shawnee district court; ALSTON W. DANA, judge. Opinion filed April 7, 1906. Reversed.

C. C. Coleman, attorney-general, and Otis E. Hungate, county attorney, for The State; R. B. Welch, of counsel.

Hazen & Gaw, for defendants in error.

The opinion of the court was delivered by

BURCH, J.: This proceeding in error was commenced to procure a review of an order of the district court vacating a temporary injunction. The injunction was granted under the authority of chapter 334 of the Laws of 1905, the material portion of which reads as follows:

"That section 4700 of the General Statutes of 1901

The State v. Tibbits.

be amended so as to read as follows: Sec. 4700. An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney-general, upon information and belief, and no bond shall be required."

This act the court held to be unconstitutional, in that it contains more than one subject. The purpose of the act was to amend section 253 of the code. That section is a part of the chapter of the code which treats of injunctions. The entire chapter relates to the single subject of injunctions. Before the amendment section 253 enumerated certain classes of cases in which injunctions might be granted. The amendment merely added to the list. The subject of the chapter is now, the same as before the amendment, the subject of each section it contains.

If the defendant's view were correct, it might be argued that section 238 (Gen. Stat. 1901, § 4685), embraced in the same chapter, is multifarious because it enumerates some three or four occasions upon which a temporary injunction may be granted. Clearly, however, the legislature does not there deal with waste, fraudulent transfers, and the like, but with temporary injunctions. So the burden of section 253 is not taxation, improvident public contracts, and nuisances, but the right to invade those fields with an injunction. If the principle of interpretation here applied were

The State v. Ricksecker.

not the true one section 5 of the act relating to corporations (Gen. Stat. 1901, § 1249) would contain forty different subjects instead of one, and it would be impossible to pass a valid law of comprehensive scope.

By the terms of the act relating to injunctions a temporary injunction is a provisional remedy. Hence an order vacating a temporary injunction is reviewable under the second subdivision of section 542 of the code. (Gen. Stat. 1901, § 5019.)

The judgment of the district court is reversed, and the cause remanded.

All the Justices concurring.

THE STATE OF KANSAS V. E. H. RICKSECKER.

No. 14,648. (85 Pac. 547.)

SYLLABUS BY THE COURT.

1. **CRIMINAL LAW—*Information—Election of Counts.*** Where an information contains several counts, intended to charge the same substantial offense in different ways, and their allegations are not inconsistent, it is ordinarily not error for the trial court to refuse to require the state to elect upon which one it will rely for a conviction.
2. ——— ***Verdict—Sufficiency.*** In such a case a verdict of guilty which fails to refer to any specific count is sufficient, and will be regarded as a finding of guilty upon all of them.
3. ——— ***Evidence Admissible under One Count—Defective Counts.*** In such a case, if all the evidence introduced would have been admissible under one count, which states a public offense, the fact that one or more of the other counts may fail to do so, or may fail to bring the case within the operation of the particular statute under which they are drawn, is not fatal to the conviction.
4. ——— ***One Good Count—Instructions.*** Where an information contains one good count, and several others which repeat its allegations, with others which are unnecessary and do not change the character of the offense, a conviction will not be disturbed on account of any failure to instruct upon such

The State v. Ricksecker.

additional matters, where no prejudice results to the defendant with respect to his trial upon such good count.

5. EVIDENCE—*Judicial Notice*. The courts will take notice without proof that a municipality is a city of the second class, where it has been made such under the statute by a public proclamation issued by the governor.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 7, 1906. Affirmed.

C. C. Coleman, attorney-general, *T. E. Wagstaff*, county attorney, and *S. J. Osborn*, for The State.

J. H. Keith, and *Charles Bucher*, for appellant.

The opinion of the court was delivered by

MASON, J.: E. H. Ricksecker appeals from a conviction upon a charge of embezzling money that came into his hands as superintendent of the water-works system owned and operated by the city of Coffeyville. The defendant held that position from April, 1900, to May, 1903. After he had retired from the office the claim was made that he had failed to account to the city for all of the public funds that he had received in virtue of it. An investigation followed, as a result of which a prosecution for embezzlement was begun July 12, 1904.

The information which was afterward filed, and upon which he was tried and convicted, contained three counts. The first charged him with embezzling as an officer of the city the sum of \$4083.84, that evidently being considered the total amount of his shortage. Upon the theory that he might have converted a part of this to his own use more than two years before the criminal action against him was begun it was alleged that he had concealed the fact of his crime until April, 1903, this allegation being plainly intended to avoid the effect of the statute of limitations. The second count was like the first, except that the allegation

The State v. Ricksecker.

of concealment was omitted and the amount embezzled was placed at \$2600. It is clear that it was the purpose of the pleader in this count to declare only upon such conversion as had taken place within the period fixed by the statute of limitations. The third count set out the amount of the entire shortage, and was drawn under that part of the embezzlement statute (Gen. Stat. 1901, § 2081) which was first enacted in 1873, and which makes it a criminal offense for an agent under certain circumstances to fail to pay over upon demand money collected for his principal. Doubtless this count was added with the idea that it might evade any question of limitation, upon the theory that the statute does not begin to run against proceedings under this part of the statute until a demand is made.

At the conclusion of the evidence a motion was made to require the state to elect upon which count it would rely for a conviction. The motion was denied. The verdict returned merely declared the defendant "guilty of the crime of embezzlement, all as in manner and form charged in the information," and that the value of the funds embezzled was \$2366.65.

Under various assignments of error the defendant's counsel complain of rulings relating to the first and third counts, or having some connection therewith. It is contended that an election between the counts should have been compelled; that the form of the verdict was insufficient, inasmuch as it did not refer to any specific count; that the allegation in the first count of the concealment of the crime was too indefinite to have any effect; that the court gave no sufficient instruction as to what acts could be regarded as constituting a concealment; that the statute under which the third count was drawn had no application to the state of facts relied upon by the prosecution in this case; and that the instructions with regard to a demand were defective. All these complaints may be considered and disposed of together. It is manifest that the several counts in

the information did not charge three separate and distinct offenses. They were obviously intended only as three different ways of stating the same offense—namely, the converting to his own use by the defendant of that part of the funds of the city which came into his hands as superintendent of the water-works, and which was otherwise unaccounted for. Under such circumstances a verdict of guilty is valid, although it contains no reference to any particular count.

“When but one offense is charged in various forms in separate counts of one indictment, a general verdict of guilty, or of guilty as charged, without mentioning the count on which it is based, is sufficient. The same rule is applicable, although several distinct crimes are charged in different counts, if they all arose out of the same transaction.” (12 Cyc. 693.)

Such a verdict is regarded as a finding that the defendant is guilty upon each one of the several counts, and it can therefore be sustained even if some of the counts are bad, for it will be held to respond to any good count that the information contains.

“One good count in an indictment, if sustained by the proof, will support a general verdict of guilty, although there be other counts which are defective. So where there are two or more counts in the indictment, and but one offense in fact is charged, a general verdict of guilty is good if one of the counts be good and the allegations in it are sustained by the evidence.” (12 Cyc. 694.)

For these reasons there was no necessity in this case for the state to elect upon which count it would rely, or for the verdict to refer in terms to any particular count. The same considerations make it needless to inquire whether the first count sufficiently charged a concealment of the offense, or whether the third count stated an offense within that part of the statute under which it was drawn. It may be conceded to the defendant that where the prosecution is compelled to show a concealment in order to convict the facts relied upon as constituting concealment should be

The State v. Ricksecker.

specifically pleaded (*Jones v. The State*, 14 Ind. 120) ; and also that the decisions of this court tend to support the view that the part of the statute which is the basis of the third count, and which makes a demand and refusal to pay essential features of the crime there denounced, does not apply to any case where the offense of embezzlement could be complete without such demand and refusal (*The State v. Bancroft*, 22 Kan. 170; *The State v. Yeiter*, 54 Kan. 277, 38 Pac. 320), and therefore cannot be invoked against a city officer with respect to money which it was his duty to turn over to the city without demand. Such concessions can avail him nothing. No question is made of the sufficiency of the second count. The first count is in substance the same as the second, except that a larger amount is named as the sum embezzled and the allegation of concealment is added; the third count is the same as the second, with the allegation of demand added. No evidence was admitted under the first or third count that would have been materially erroneous if the second count had stood alone, and the defendant was in no way prejudiced by their presence in the information.

An important feature of the case made by the state was the testimony of an expert accountant who undertook not only to give the total amount of the defendant's shortage, which he fixed at \$2366.65, but to separate this amount into two parts, the one (\$1028.43) made up of items received more than two years before the prosecution was begun, the other (\$1338.22) of those received within that period. As the jury found the amount embezzled to be \$2366.65, it is clear that the verdict was based upon this testimony. It follows that the jury held the defendant criminally liable for all the money for which he failed to account, including that portion as to which he claimed immunity under the statute of limitations. But it also follows that they convicted him of embezzling that portion as to which no question of limitation could be raised. He was not

convicted, however, of two offenses—of embezzling \$1028.43 at one time and \$1338.22 at another—but of the single offense of embezzling by one act the sum of \$2366.65, which included \$1028.43 that was collected more than two years before the prosecution was begun. The crime of embezzling \$2366.65 differs neither in degree nor kind from that of embezzling \$1338.22. It requires no greater or different punishment. If it was error for the jury to include the latter amount in their statement of the amount embezzled, it was harmless error. Inasmuch as the question of concealment was immaterial there is no occasion to consider whether the court should have given more definite instructions concerning it. It may be remarked, however, that no special instruction in that regard appears to have been asked. Inasmuch as the instructions relating to a demand had no reference to the second count it is unnecessary to consider the criticisms made upon them, for the reasons already stated.

Specific complaint is made of the admission of evidence of the payment of several warrants issued to the defendant for water used by the city. It appears that the city, although owning its own water-works, kept the business done in that connection entirely separate from the other affairs of the municipality, and paid for water used for public purposes the same as any other consumer. The evidence warranted the finding that the proceeds of these warrants came into the hands of the defendant in his official capacity.

Error is also assigned because of the admission of evidence having some tendency to show that the defendant had been accused of being short in his accounts in another capacity. The evidence objected to was not offered for the purpose of showing this fact, but had some bearing upon the legitimate issues, and the fact that it incidentally suggested the commission of another offense did not bar its reception.

The information alleged that Coffeyville was a city

The State v. Ricksecker.

of the second class, and complaint is made that while there was no proof of the fact the court assumed its existence. Under our statute a city of the second class becomes such in virtue of a public proclamation made by the governor, of which the courts take notice. (17 A. & E. Encycl. of L. 914; 16 Cyc. 903.) The case of *The State v. Pittman*, 10 Kan. 593, in which it was said that judicial notice cannot be taken of the incorporation of a city under a general law, was decided under a different statute. (See, also, *The State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; *LaRue v. Insurance Co.*, 68 Kan. 539, 75 Pac. 494.)

It is contended in behalf of the defendant that he should have been granted a new trial because under the whole evidence if he was guilty at all he was guilty of several distinct acts of embezzlement, inasmuch as he was under a duty to turn over to the city at stated intervals the public funds then in his hands. The mere failure to perform this periodical duty, however, did not of itself render him guilty of a criminal offense. It is possible that he did upon several different occasions wrongfully convert to his own use the money then in his possession, but the evidence is consistent with the view that there was no criminal intent, and consequently no crime, until the entire missing amount had accumulated, and that he then wrongfully by one act embezzled the entire sum. This feature of the case appears to have been sufficiently covered by the instructions, and we are unable to perceive that the defendant has any just cause of complaint in connection therewith.

Other assignments of error have been examined, but are not thought to require separate discussion. The judgment is affirmed.

All the Justices concurring.

73	502
75	8

FLORENCE D. WHITNEY *et al.* v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MORTON.

No. 14,757. (85 Pac. 530.)

SYLLABUS BY THE COURT.

1. **COUNTY COMMISSIONERS**—*Collection of Delinquent Taxes—Consolidation of Suits.* Under chapter 392 of the Laws of 1901 (Gen. Stat. 1901, §§ 7718-7724), relating to the collection of delinquent taxes on real estate and providing a remedy by sale under decree of court, separate proceedings against individual tracts are permissible. In many instances there ought to be a joinder. In all cases the board of county commissioners ought to exercise care, when ordering proceedings to be commenced, not to multiply costs; and if by a consolidation the district court can aid in keeping costs at a minimum it should make an order to that end, on request, unless controlled by some paramount consideration to the contrary.
2. ——— *Costs—Discretion of District Court.* If the action of the board of county commissioners in ordering separate proceedings should result in oppression and palpable wrong, the district court may tax any unjust increase in costs so made to the plaintiff.
3. **TAXATION**—*Fraudulent Valuation—Illegal Increment Eliminated.* In a proceeding brought under the provisions of the statute referred to the district court is required to investigate and decide what taxes have been legally assessed and charged upon the land in controversy. An increment to taxes occasioned by a fraudulent valuation is illegal, and should be eliminated from the amount of the plaintiff's lien.
4. **LIMITATION OF ACTIONS**—*Suit to Enforce Tax Lien.* The statute requiring actions to enforce a liability created by statute to be commenced within three years has no application to suits brought to enforce tax liens.

Error from Morton district court; WILLIAM EASTON HUTCHISON, judge. Opinion filed April 7, 1906. Reversed.

Allen & Allen, for plaintiffs in error.

M. J. Allen, county attorney, for defendant in error;
George Getty, and *G. Porter Craddock*, of counsel.

The opinion of the court was delivered by

BURCH, J.: This proceeding in error grows out of a suit brought to enforce tax liens under chapter 392 of the Laws of 1901 (Gen. Stat. 1901, §§ 7718-7724), providing a remedy by sale under decree of court. Under an order of the board of county commissioners the county attorney brought a large number of suits to foreclose tax liens, devoting a single suit to each unredeemed tract. A large number of defendants moved for a consolidation, and the refusal of the court to comply with their applications is assigned as error.

The statute relates to "cases" in which real estate remains unredeemed, and the commissioners are given authority to order proceedings against so much of the unredeemed real estate of the county as they may direct. Separate proceedings therefore are permissible, although not required. In many instances, no doubt, a single suit for the foreclosure of the lien upon a single tract is the only proper method of procedure. In many other cases there should be a joinder, and the board of county commissioners always ought to exercise great care when ordering proceedings not to multiply costs. Likewise when the matter of consolidating suits already commenced is presented to the district court it should manage the litigation in such a way as to keep costs at a minimum.

One individual may be the owner of a large number of tracts, all affected by the same tax proceedings. In such a case it would be unjust for the board of county commissioners to require separate suits, and it would be an abuse of discretion in the district court not to consolidate such suits after they had been started, unless some exceptionally important fact should control to the contrary. Other clear cases might be suggested. No very large amount of arbitrary power has been distributed among officers and tribunals of this state vested with authority in public affairs, and if the ac-

tion of the board of county commissioners in ordering separate proceedings should result in oppression and palpable wrong the district court should remedy the injury by apportioning costs at the time of the decree.

The board of county commissioners has a discretion only as to the time and manner in which it will act. When proceedings have been commenced it is merely a party, and the district court has jurisdiction to protect the rights of all concerned. The proceeding is equitable—for the enforcement of a lien—and the lien-holder may be required to bear whatever unconscionable increase it may make in the costs. In this case the only reason given for the motions to consolidate is that the suits might have been joined. It cannot be said, therefore, that the district court abused its discretion.

The answers pleaded facts showing a fraudulent valuation, whereby the defendants' taxes were greatly increased, but the defendants were not permitted to introduce evidence in support of this claim. The plaintiff contends that the remedy lay in an application to the board of equalization. The statute requires the court "to investigate and decide what taxes shall have been legally assessed and charged on such land, lot, or piece of ground, and to render judgment therefor, together with the interest and penalty thereon as provided by law." (Gen. Stat. 1901, § 7720.) This does not mean that mere errors of judgment, mistakes or simple irregularities on the part of any of the officials may be corrected in the foreclosure suit. But an increment to taxes occasioned by fraud in the valuation of the property affected is so far illegal as to be within the contemplation of the statute. Without the statute the courts have exercised jurisdiction to restrain the collection of taxes which were the result of conduct quite similar to that described in the answers in this case (*C. B. & Q. Rld. Co. v. Comm'rs of Atchison Co.*, 54 Kan. 781, 39 Pac. 1039), and the legisla-

Whitney v. Morton County.

ture evidently intended to give the court authority to eliminate the products of fraud, corruption and gross injustice from the amount of the claimed lien before entering a decree for the sale of the land.

The defendants claim that the liability of their land to sale for taxes under a decree of court is one created by statute, and hence that suit for that purpose must be brought within three years. Under the provisions of section 5 (Gen. Stat. 1901, § 7722) the board of county commissioners acts in a representative capacity. The proceeding is brought for the benefit of the state of Kansas and all of its municipal subdivisions interested in the taxes to be recovered. The proceeds of the foreclosure sale are distributed among the beneficiaries, including the state, ratably in proportion to their several interests. Under the well-known rule statutes of limitation do not apply to the state except by specific reference. The state is certain to be interested in almost every proceeding brought under the act. No discrimination having been made between those cases and others, it is plain the legislature did not intend that suit should be barred in any instance by lapse of time. Other considerations lead to the same interpretation, but it is not necessary to elaborate them.

For the error committed in rejecting evidence under the answers the judgment of the district court is reversed, and a new trial awarded.

All the Justices concurring.

Smith v. Haney.

J. E. SMITH, as *County Treasurer, etc., et al.*, v. ALEX.
HANEY *et al.*

No. 14,763. (85 Pac. 550.)

SYLLABUS BY THE COURT.

1. COUNTIES—*Erection of Court-house—Use of General Fund.* Section 3 of chapter 167, Laws of 1905, is to be interpreted as authorizing the commissioners of Gove county to use a part of the general revenue fund for the building of a court-house.
2. CONSTITUTIONAL LAW—*Diversion of a Tax—Void Provision of a Statute.* Such provision violates section 4 of article 11 of the state constitution (Gen. Stat. 1901, § 205), forbidding the diversion of a tax from the object for which it is levied, and is therefore void.
3. ——— *Partial Invalidity Held to Render Entire Act Void.* Such provision is so related to the other provisions of the act that it cannot be said that the legislature would have passed any of them independently of this one, and the entire act is therefore void.

Error from Gove district court; JAMES H. REEDER, judge. Opinion filed April 7, 1906. Affirmed.

J. S. West, and O. B. Jones, for plaintiffs in error.

E. L. Tustin, A. D. Gilkeson, and Lee Monroe, for defendants in error.

The opinion of the court was delivered by

MASON, J.: The legislature of 1905 passed a law (Laws 1905, ch. 167) to authorize the county commissioners of Gove county to build and equip a court-house without a vote of the people. The maximum cost of the building was fixed at \$16,000. Provision was made for the expense of the building and equipment by the levy of a special annual tax of not more than three mills on the dollar for not more than four years, the proceeds of these levies to form a separate fund to be known as the "county building fund," against which warrants were to be drawn for all obli-

gations arising from the construction and furnishing of such court-house. A further provision of the act, upon the construction and effect of which the present litigation turns, reads as follows:

"The said board of county commissioners are hereby authorized to use and expend in the erection, equipment and furnishing of said court-house and county-office building, in the year or years in which a tax may be levied, as they may deem necessary, in addition to the amount or amounts raised by the levy of the tax as herein provided for, such sum or sums from the general fund of said county not otherwise appropriated after all other running expenses of said county shall have been provided for." (Laws 1905, ch. 167, § 3.)

A tax having been levied under color of such statute, a suit was begun to enjoin its collection, upon the ground that the act was unconstitutional. An order was made granting a temporary injunction, to reverse which this proceeding is brought. The only attack upon the validity of the statute which it will be necessary to consider is based upon the claim that the portion above quoted is void because it attempts to authorize the proceeds of a tax to be used for a purpose different from that for which it was levied. The plaintiffs in error practically concede that if this portion of the act means anything at all it is open to the objection urged, but they argue, first, that it is unintelligible and may be disregarded entirely, and, second, that if it is given a construction which renders it obnoxious to the constitution it may be rejected on that ground without affecting the validity of the remainder of the act. The three questions to be determined are, therefore: (1) Does the language quoted mean that the commissioners may use in the construction of a court-house such part of the general revenue fund of each year as shall prove not to be needed to pay the current expenses of that year? (2) As so construed, is this part of the act void? (3) If so, is it so far an

independent provision that the remainder of the act may stand, notwithstanding its invalidity?

The criticism of the language of the part of the act which is quoted is based upon the apparent incompleteness of the last clause, introduced by the words "such sum or sums," the contention being that the omission of "as," the correlative of "such," leaves the phrase indefinite and meaningless. It is asserted in the brief of plaintiffs in error that "no pedagogue, however high his learning, could successfully parse this sentence and diagram it." This may be true, but it is not important. "The rule that bad grammar will not defeat the operation of a statute is old and well settled." (26 A. & E. Encycl. of L. 612.) If it be thought necessary to provide the missing "as" it may be located in either of two ways. The sentence may be deemed elliptical, the words "as are" being understood between "county" and "not," resulting in this reading: "Such sum or sums from the general fund of said county [as are] not otherwise appropriated after all other running expenses of said county shall have been provided for." Or the phrase "as they may deem necessary" may be transposed so as to follow "such sum or sums," giving the reading: "Such sum or sums as they may deem necessary from the general fund," etc. Either of these interpretations would be permissible under the established rules governing statutory construction. (26 A. & E. Encycl. of L., 612, 613.) But probably a sufficient solution of the problem is to be reached by a reasonable consideration of the language as it stands, with a purpose to arrive at its intended effect. So regarded, there is no difficulty in saying that the legislature clearly meant to authorize the commissioners in their discretion to use the unexpended balance of the general revenue fund for several years toward paying for the construction of the court-house.

Although, as already said, it is practically conceded that this view renders this much of the statute uncon-

stitutional, it may not be out of place to state the grounds that compel that concession. Section 4 of article 11 of the state constitution provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied." (Gen. Stat. 1901, § 205.) The phrase "general fund," as applied to the fiscal management of a Kansas county, has a definite and well-recognized meaning. It covers the proceeds of a tax levied to provide for the usual current expenses. The building of a court-house is a special or extraordinary matter, and not one included in the purposes for which the general tax levy is made. To permit the diversion to that use, therefore, of any part of the unexpended proceeds of a general revenue tax would be a violation of the spirit and letter of the constitution. (*National Bank v. Barber, Treas., &c.*, 24 Kan. 534; *A. T. & S. F. Rld. Co. v. Woodcock, Treasurer*, 18 Kan. 20; *The State, ex rel., v. Comm'rs of Marion Co.*, 21 Kan. 19.)

It remains to consider whether the invalidity of this portion of the act vitiates the whole of it. It would serve no purpose to review the cases deciding the effect of the partial unconstitutionality of statutes. Each of necessity turns upon its own peculiar facts, and throws but little light upon the determination of others. There is no difficulty in stating the general rule, however much doubt may arise in its application. When a court finds that one part of a statute is in contravention of the fundamental law, the inquiry, so far as relates to the effect of this holding on the remainder, is whether the legislature would have passed such remaining and unobjectionable portion without the obnoxious feature. To give effect to any part of such act the court must be convinced that the legislature intended that part to become the law, uninfluenced by any consideration growing out of the provisions that were beyond the legislative power. It is not enough

that it cannot be said with positiveness that the joinder with the objectionable matter did contribute to the passage of the rest of the act; there must be an affirmative assurance that the desire to accomplish the unconstitutional purpose formed no part of the motive of the lawmakers in permitting the passage of that portion of the act which is free from objection. The court's duty is to ascertain and carry out the legislative will—not what the lawmaking body may possibly have desired, but what there is satisfactory evidence that it did desire. The fact that the legislature enacts a law embodying two propositions, which are so related that either may naturally have served as a reason for the other, creates no presumption that it wished either to be enforced separately. That presumption arises in favor of one of such propositions only when there is ground to believe that it received the legislative sanction on its own merits and not because of its union with the other. Therefore “when it appears . . . that the passage of the invalid section may have been the inducement or compensation for the passage of the constitutional sections, then a removal of the void part must cause the whole act to fall.” (*Conklin v. Hutchinson*, 65 Kan. 582, 584, 70 Pac. 587.)

In the present case it must be assumed that the legislature, in undertaking to decide for the people of a county a matter which it is the general policy of the law to permit them to regulate for themselves, made an investigation of the needs and resources of the community affected and acted upon the basis of the information so obtained—that the probable surplus that might be anticipated from one year's general revenue was estimated, as well as the amounts likely to be obtained from the special tax levies, and that the amount to be expended for the court-house and the rate of the special tax may have been fixed with reference to these estimates. The act presents a complete and symmetrical plan for accomplishing a given object. In its

title one of its purposes is stated to be "to appropriate money from the general fund" of the county to pay for the expenses of building and equipping the courthouse. From the nature of the case it appears that the provision having relation to the diversion of a part of the general revenue of the county to a building fund may have been an inducement for the acceptance of the rest of the act. We cannot say that this provision was so separate from, and independent of, the others that we are warranted in presuming that the legislature would have consented to any of them without this one. It follows that the entire act must be held void. The judgment is affirmed.

All the Justices concurring.

GEORGE ANDERSON FOWLER *et al.* v. ANNIE B.
WOOD *et al.*

No. 13,926. (85 Pac. 763.)

SYLLABUS BY THE COURT.

1. **STATE BOUNDARY—Navigable River—Change of Position by Imperceptible Process.** If a navigable river dividing the territory of two states change its position by gradual and imperceptible encroachment or insensible recession, so that the process by which the removal is accomplished cannot be detected while in operation, the boundary follows the shifting thread of the stream.
2. **NAVIGABLE RIVER—Title to Bed, and Banks—Accretion.** In Kansas the title to the bed of a navigable river is vested in the state; private ownership in bordering land extends only to the river's margin, and if the position of the stream change in the manner described in paragraph 1 the boundary between the land of the state and that of other proprietors follows the movement of the river's edge.
3. ——— **Sudden Change of Course—Boundaries.** If while a river of the character described is at flood stage an ice-gorge cause a sudden and violent irruption of the water, whereby

the lands upon one side are visibly degraded or submerged, or a new channel is cut, the state boundary remains stationary at its former location, and the titles and boundaries of private owners remain unchanged.

4. ——— *Submerged Land—Reappearance—Reclamation.* If through the deposit of alluvion upon the former site, a deflection of the current of the river, or other action of the water, land submerged by avulsion be made to reappear, it may be reclaimed if its identity can be established.
5. ——— *New Formations—Accretion—Reliction.* New formations arising from the bed of a river belong to the owner of the bed, and new formations added to a bar or an island in the channel of a river by the process of accretion or reliction belong to the owner of the island or bar.
6. ——— *Change of Boundary—How Effected.* In order to effect a change of boundary, formations resulting from accretion or reliction must be made to the contiguous land, and must operate to produce an expansion of the shore-line outward from the tract to which they adhere.
7. ——— *Conveyance of Upland—Reappearance of Submerged Land.* If the owner of a body of land, a part of which has been submerged, convey the upland and retain title to the remainder, the purchaser, upon the reappearance of the submerged portion, can include it within his boundary only by the process of accretion or reliction.
8. ——— *Rights of Riparian Owners—Deflection of the Stream.* An owner of land bounded by a navigable stream has the right to protect his soil against inroads of the water, to secure accretions which form against his bank, and to erect and maintain improvements necessary to promote commerce, navigation, fishing and other uses of the river as navigable water; but he has no right, by obstructions placed across the main current, to deflect the stream itself into a new channel.
9. ——— *Deflection of Channel—Filling of Channel from Bottom—Boundaries.* If the channel of a river separating mainland belonging to one proprietor and an island, bar, restored land or other formation belonging to another proprietor be deflected and fill up so that the two bodies of land join, each owner is entitled to the accretions to and the relictions from his own shore. If the channel fill up from the bottom, without accretion to or reliction from either side, the boundary is the center of the channel as it was before the water left it.

10. ——— *Reappearance of Submerged Land after Partition—Rights of Owners.* After proceedings had been commenced to partition a body of land bounded upon two sides by navigable streams, and containing 250 acres, more or less, a portion of the tract was submerged by a violent flood. A survey was made before the water had subsided, and the partition commissioners reported that owing to the waste by the washing away of the banks of the rivers the quantity of land had decreased to 200 acres. Allotments were made proportional to that quantity, and the report was confirmed. The next year when the water went down a portion of the submerged land reappeared, and all of it, with accretions added, was subsequently restored. *Held*, that the owners are entitled to a partition of the undivided land with its accretions, on the equitable ground of a mistake as to the existence of a part of the subject-matter of the former suit.
11. ——— *Conveyance of Land—River Boundary—Presumption—Evidence.* If a private owner grant land, bounding it generally upon a river, the presumption that the grant will carry title as far as he owns is rebuttable, the question being purely one of intention; and when the intention is ascertainable from the record of a proceeding, or the face of an instrument, other evidence is inadmissible.

Error from Wyandotte district court; E. L. FISCHER, judge. Opinion filed May 12, 1906. Affirmed.

Miller, Buchan & Miller, C. F. Hutchings, S. D. Hutchings, and Thomas J. White, for plaintiffs in error; *H. M. Meriwether*, pro se.

Rossington, Smith & Histed, William B. Trembley, William L. Wood, J. O. Fife, Frank Hagerman, and Edward C. Wright, for defendants in error.

The opinion of the court was delivered by

BURCH, J.: The action in the district court was one of ejectment and partition. In 1857, pursuant to treaty stipulations with the Wyandotte Indians, the United States patented to Silas Armstrong a tract of land, irregular in shape, lying in the fork of the Missouri and Kansas rivers north of Turkey creek, and containing some 274.7 acres. The land was low bottom-land, of

the peculiar formation which characterizes the valley of the Missouri river in this region, and subject to the vicissitudes which result from the conduct of that capricious stream. By purchase and descent various parties acquired undivided interests in this land. In some instances quantities in acres were conveyed, to be derived from the undivided holdings of the grantors. By the close of the year 1866 some twenty-five different parties claimed to be tenants in common of the tract, and on January 23, 1867, a suit was brought in the district court of Wyandotte county to partition it. The petition designated the land as "all that parcel of land lying in the fork of the Missouri and Kansas rivers and between the Missouri state line and the Kansas river as lies north of Turkey creek." The area was estimated at "about 250 acres, more or less."

On April 11, 1867, the court ordered that "for the purpose of ascertaining the quantity of land included in the boundaries mentioned in the petition of said plaintiffs a survey of the same be made, and it being represented that John Runk, jr., is a competent person to make said survey, he is hereby empowered to make the same and report by Saturday morning next." On April 13, 1867, a decree of partition was entered, which describes the land as it is described in the petition, and which closes by ordering a writ in due form to be issued to the sheriff of Wyandotte county, commanding him by the oath of three judicious and disinterested freeholders named to cause "the same said land" to be set off and partitioned among the parties found by the court to be entitled to portions thereof.

On September 26, 1867, the partition commissioners made their report. Those who were entitled to acre quantities were given shares out of the undivided interests of their grantors. In the description of various allotments boundary-lines are described as running "to the east bank of the Kansas river; thence down the same," etc.; and "to the west bank of the Missouri

river; thence down the same," etc.; and on the plat accompanying the report a number of lots are extended from river to river. The commissioners' report concludes with the following statements:

"By a survey which was made of the lands during the April term of the first district court, A. D. 1867, they were found to contain 208.4 acres, upon which a division was based. . . . A careful survey, made during the month of July last, shows that owing to the waste by the washing away of the banks of the Missouri and Kansas rivers the quantity of the land has decreased to 200 acres.

"The allotments are proportional to this in quantity, and give an area to Thomas Ewing, jr., of 18.63 acres; Calhoun heirs, 16.84 acres; Graham, 8.28 acres; Armstrong heirs, 34.58 acres; James, 54.42 acres; Wood, 20.94 acres; William Weer's heir, 25.13 acres; Swope, 9.06 acres; and the Union Pacific railway, E. D., 11.58 acres.

"The accompanying plat, hereto attached, represents the allotments, with the courses and distances marked on the lines, and the several areas in acres and hundredths of an acre."

The report of the commissioners was confirmed by the court on October 15, 1867, and no action having been taken to review the proceedings, they became final.

Subsequently to the partition suit the Missouri river continued to encroach upon those allotments of which it formed the boundary, and in order to prevent their lands from washing away the several owners entered into a contract with James F. Joy to deed him certain tracts bordering upon the stream, and extending back for quantity, in consideration of his riprapping the river-bank. The agreement is dated in August, 1868, and the work was completed within a few months following. Deeds were duly delivered to Joy whereby he acquired the entire Missouri River frontage from the mouth of the Kansas river to the state line, except that opposite the land of two of the allottees in the partition suit, Swope and Ewing, who paid for their proportion

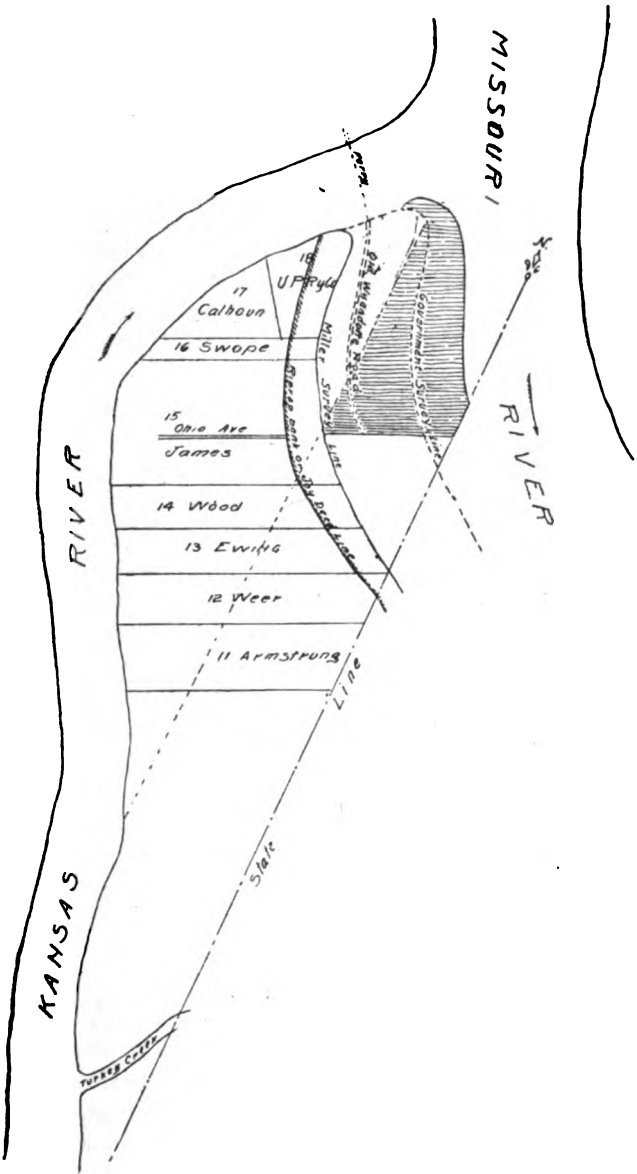
of the work of riprapping in cash. The calls in the Joy deeds were to the bank of the Missouri river, and down and along the same. Later the title of these riparian owners passed either mediately or directly to the Armour Packing Company, the Hannibal & St. Joseph Railroad Company, the Fowler Land Association, the Metropolitan Water Company, and others.

From the time of the partition down to the time when the bank was protected a considerable quantity of land along the channel of the river was carried away by erosion. The final survey under which partition was made is known as the Miller survey, and the riprap bank, or Joy deed line, lay south of the north line of the Miller survey, at distances varying from 200 to 300 feet. The composite map following indicates crudely the position of the Missouri River bank at the time of the government survey, the Miller survey line, the riprap bank or Joy deed line, several of the allotments made by the commissioners in the partition suit, and affords some other information which may be useful in arriving at a comprehension of the case.

From 1868 until 1889 the deep-water channel of the Missouri river lay next to the riprap bank. Business enterprises requiring access to the river were established there. For a long time the Fowler Packing Company maintained a wharf upon its land (partition lot 16 and a segment of lot 15), from which steamboats loaded and discharged their cargoes, and all the commerce of the stream was carried upon the current which pressed against that bank. About the year 1889 the main current was diverted to the Missouri side of the stream. The old channel filled up, and at the commencement of this litigation the river was separated from the old riprap bank by a wide stretch of land many acres in extent.

This suit relates to land lying north of the Miller survey line and between that line and the river where it now runs. The plaintiffs are persons who have ob-

Fowler v. Wood.



tained title by purchase or descent from the allottees in the partition suit other than those who were given acre quantities, and for all purposes of the case may be termed tenants in common of the Armstrong grant. The defendants may be designated as purchasers of those portions of the Armstrong grant which are shown by the report of the commissioners in the partition suit to border upon the Missouri river. With them are joined some of the cotenants of the plaintiffs.

The plaintiffs claim that, following unusual rains, the ice in the Missouri and Kansas rivers broke up early in the year 1867, after the partition proceedings were begun, and formed a gorge near the confluence of the streams. A stage of extraordinary high water followed, and the Missouri river with great rapidity and violence cut a new channel through the tract described in the partition suit. The June rise succeeded, and the water continued high throughout the year. The April survey in the partition proceedings disclosed that but 208 of the 250 acres of land remained, and by the next July eight acres of that had washed away. Consequently 200 acres, and no more, were partitioned, the allotments being made proportional to that quantity. Upon the subsidence of the flood in 1868 a portion of the Armstrong grant which had been submerged, and which had been cut off from the partitioned land by the new channel of the river, reappeared in the form of an island, upon both sides of which the water flowed, the great volume, however, passing through the channel and continuing to erode the bank until the Joy deed line was reached. The size of this island increased by accretions to it upon all sides. About the year 1889 some of the defendants placed obstructions out in the channel of the stream which, together with other artificial means, caused the main current to be deflected to the opposite shore. For some time the water lay in pools along the channel next to the riprap bank, but these at last disappeared and the island expanded to the mainland.

The plaintiffs say they were not deprived of their land by the action of the river in the year 1867, or by the partition proceedings, or by any other means, and that all of such land with its accretions has been restored to them unpartitioned and in identifiable form.

The defendants dispute the facts furnishing the foundation of the plaintiffs' claim. They dispute some of the legal principles invoked in aid of such claim, and they deny the applicability of other principles essential to its support. Further than this, they assert that the plaintiffs are estopped from claiming that all the land of the Armstrong grant was not partitioned, and are estopped from denying that the partition allotments have followed the recession of their movable boundary—the river itself—to its present location.

Upon a trial by jury the plaintiffs and those defendants who are cotenants with them were awarded land indicated by the shaded portion of the map. The court rendered judgment upon the verdict, and reserved the matter of partition pending this proceeding in error. The jury returned answers to a large number of special questions covering practically all of the paramount facts. The special findings show that in 1856 the Armstrong grant contained 274.7 acres. When the partition suit was commenced it contained 250 acres, more or less. A new channel was cut through the land in controversy by the high waters of the Missouri river in 1867; the land in controversy was suddenly and perceptibly submerged by the violent rise of the river in that year; the ice-gorge of that year caused the river to cut a new channel and to wash away the bank; the cutting and the washing away of the bank between Kaw point (the point of land at the junction of the rivers) and the state line was not done in the usual manner of cutting along the banks of the Missouri river; the new channel varied from 200 to 300 feet in width, and after it was cut was the main channel of the river.

The jury further found that in 1865 or 1866 the Missouri river began to wash away the bank forming the border of the Armstrong grant, and in 1866 and 1867 the land caved into the river and washed away quite rapidly; but, as distinguished from this process, a portion of the land was cut off by the new channel of 1867 and left lying to the north of it in the form of an island. The land so cut off was from 100 to 200 feet wide and from 800 to 1000 feet long. It lay some 600 or 700 feet out, measuring from the line the river reached when the south bank was riprapped, and the south boundary of partition lot 18, if extended, would have about crossed its northwest point. No island was in existence between the mouth of the Kansas river and the state line when the partition suit was commenced. The one formed as described continued in existence at all times up to 1891 or 1892, when the water ceased to flow in the channel separating it from the mainland.

The findings also state that the high water continued during the entire season of 1867. During the flood the island referred to was entirely submerged. The top of it was scoured off and washed away. It did not reappear until the water had subsided the next year, and then it presented itself as a new formation of sand, or sand and soil, which afterward supported a growth of willows and weeds for some of the time. In later years it was frequently submerged, and its configuration changed somewhat, but it remained visible at all times in low stages of water. (In answer to one of the numerous and pertinacious special questions upon this subject the jury used the expression "very low water.")

The jury further found that a portion of the land in controversy was formed by accretions to the island. Prior to 1889 an accretion of sand, or sand and soil, formed in front of partition lot 18, about 100 feet wide at Kaw point. In that year what is known as the water-works dike was constructed in the river by one of the defendants, the Metropolitan Water Com-

pany, commencing 100 feet from the riprap bank. At the time the dike was built no deposits had begun to form in front of lots 12, 13, and 14. An accretion also formed in front of lots 15 and 16, but to the time of bringing suit it had extended only 250 feet (less than the width of the channel between the mainland and the island). After the dike was constructed the river ran around the end of the island in a southeasterly direction, in a channel lying north of it. The Ohio Avenue sewer, of Kansas City, Kan., was extended to this channel in 1889, but the river ceased to run there, and by 1892 it had entirely filled up, the river having receded beyond the government-survey line of 1856.

These findings are conclusive upon the facts to which they relate, and require consideration in the light of the legal doctrines of avulsion, submergence and reappearance, and accretion and reliction, to determine the rights of the parties to the action. The verdict being a general one, the evidence favorable to the plaintiffs and consistent with the special findings controls in all matters not covered by the findings themselves.

In the year 1867 the Missouri river formed the boundary between the state of Missouri and the state of Kansas at the place in question. The stream was navigable, constituted a public highway between the two states, and under the legal policy of each title to its bed was vested in them, the dividing line being the center of the main channel.

The courses of rivers being determined by the operation of the elements according to natural laws, they are subject to changes of location. If the change in the position of a navigable river dividing the territory of two states be by gradual and imperceptible encroachment, or insensible recession, so that the process cannot be detected while it is going on, the boundary follows the shifting thread of the stream. But if from storm or flood or other known violent natural cause there be a sudden, visible irruption of the water, whereby the

lands upon one side are degraded or submerged or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of riparian owners whose lands have been affected remain unchanged. These principles are elementary in the law. The books teem with learning upon the subject, and the collation of authorities would be a work of supererogation. (*McBride v. Steinwenden*, 72 Kan. 508, 83 Pac. 822.)

It is argued, however, that because of its crooked course, the velocity of its current, the friable character of its banks and the quicksand substratum of the adjacent soil it is characteristic of the Missouri river that large pieces of upland should suddenly, visibly and perceptibly break off, plunge into the water, and be swept away; and from this fact it is concluded that the law of avulsion cannot be applied to the conduct of this stream, or at least that it governs only in "ox-bow" cases like *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300, *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372, and *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. If this river be distinguished from others by the violence and rapidity with which it invades the lands adjacent to its course, the findings of the jury are explicit upon the point that the Armstrong grant was not ravaged in the usual manner of cutting along its banks, and a clear distinction is made between the caving and washing away of marginal soil and the phenomena of this case. The ice-dam in the stream added an unusual and aggravating feature. Nothing short of the liberated energy of gorged water at flood-tide could have produced the tremendous results described in the testimony supporting the special findings. It is said that after the water gained headway it went through the land with a rush, tearing out the earth in massive blocks 5, 10, 20, 25 and 30 feet in width and sometimes 40, 50 and 300 feet long, felling forest-trees and otherwise devasta-

ting the tract, so that, upon an abatement of the inundation, in place of farm land a river channel 100 yards wide separated a denuded island from the shore.

The argument for the limitation of the avulsion doctrine was made in favor of the abolition of the law of accretion from the valley of the Missouri river in the cases of *Missouri v. Nebraska* and *Nebraska v. Iowa*, *supra*. The court held, however, that, notwithstanding the greater rapidity of changes here than elsewhere, the fundamental principles of the law were not affected.

In the case of *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941, the litigation arose out of circumstances much less extraordinary than those connected with the flood of 1867, but the rights of the parties were solved upon the theory of an avulsion. The facts were that the washing away of the banks of the Mississippi river opposite the city of St. Louis usually occurred at the time of the spring floods, which varied in duration but lasted from four to eight weeks. Each flood usually carried away a strip of land from off the river-bank 250 to 300 feet in width, the loss of which could be perceived in its progress. As much as a city block would be cut off and washed away in a day or two, and masses of earth from ten to fifteen feet in width frequently caved off, fell into the river and were washed away at one time. The court said:

"By findings of fact 6 to 9 the sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive Blumenthal, as riparian proprietor, of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front, as they existed in 1865, when the land commenced to be washed away.

"It is contended by the defendant, not only that the plaintiff never had any title to the bed of the river, but that, when the dry land of which he was in possession was swept away by the river and ceased to exist, his ownership of that land also ceased to exist. It is laid down, however, by all the authorities, that, if the bed

of the stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. This principle is recognized by the supreme court of Illinois, in *Buttenuth v. St. Louis Bridge Company*, 123 Ill. 535, 546, 17 N. E. 439, 5 Am. St. Rep. 545, in these words: 'The law, as stated by law-writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between states, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river-bed.' " (Page 245.)

In the case of *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185, the testimony disclosed that the building of certain piers in the city of Chicago had the effect of throwing a strong current of the Chicago river against the shore of Lake Michigan, which gradually undermined the bank. Upon the occasion of storms the bank would fall, sometimes five, ten and thirty feet in width at a time, and sometimes as much as 100 feet would be washed away in a single storm. The court held that the boundaries of the land were not changed, quoting among other authorities Hargrave's Law Tracts, 36, 37, as follows:

" 'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by Cooke and Foster, M. (7 Jac. C. B.), though the inundation continue forty years. . . . But if it be freely left again by the reflux and recess of the sea the owner may have his land as before, if he can make it out where and what it was, for he cannot lose his propriety of the soil, though it be for a time become part

of the sea and within the admiral jurisdiction while it so continues.' " (169 Ill. 407.)

The conclusion of the court was expressed thus :

"Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof." (Page 408.)

In volume 3 of Farnham on Waters and Water Rights, section 848, it is said :

"In case the river shifts its position so as to submerge land on one shore, the question is one of boundary. As seen in the preceding section, if the change in the river-channel is sudden, titles of the opposite proprietors are not changed, but if it is gradual and imperceptible, the middle thread of the river remains the boundary-line. . . . It will be remembered that the rule that the thread of the stream remains the boundary regardless of changes is based on the fact that the law presumes that the river does not change. This presumption should not be permitted to overcome an obvious and well-established fact. Therefore, if the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner."

These authorities are sufficient to show that the events of 1867 are clearly comprehended within the meaning of the term "avulsion," and it is not necessary that time be spent refining upon the words "gradual" and "imperceptible," or in framing new definitions to fit the varying facts of different cases.

They further show that it is not necessary that the river should be "annihilated" in its old bed and "reproduced in its new bed"—borrowing an expression from Vattel.

If the earth where Doctor Wood's house stood had not been swept away by the torrent, if his fences had not gone down the stream, if his corn-field had remained undisturbed, and that part of the Armstrong grant cut off by the new channel had not been stripped of its vegetation, there would be no contention now that a portion of the land had not been partitioned. The fact of its submergence and the formation of new land on the old site makes no difference in the rights of the parties.

"If the sea swallow land, if the bounds can be ascertained the owner may have them again if they are subsequently left to dry or are regained by him. And if the former extent of land can be known, it shall be returned to the owner." (Hale, *De Jure Maris*, ch. 4; 2 Rolle's Abr. 168.)

"When the denudation of the soil by the water is sudden and perceptible, the title is not changed. . . . If navigable waters, owned by the crown or state, suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property. Though the overflow continues for forty years, yet if the water recedes the owner has his land again." (Gould, *Waters*, 3d ed., § 158.)

In volume 3 of Farnham on Waters and Water Rights, section 848, it is said:

"When the title to the bed of the water is in the public the sudden submergence of a parcel of land on the foreshore does not destroy the title of the private owner if within a reasonable time it can be reclaimed and the former boundaries established."

These texts are supported by the decisions of the courts, and undoubtedly express the true rule of law. The case of *Mulry v. Norton et al.*, 100 N. Y. 424, 3 N.

E. 581, 53 Am. Rep. 206, is a leading one upon this subject. The syllabus reads:

"Land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity of the land from being established.

"If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner.

"No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity or boundary on the firm land.

"And so if an island forms upon the land submerged, it belongs to the original owner."

In the opinion it was said:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.

. . . A case quite in point is referred to by the respondent's counsel as arising in Delaware in 1815, decided by the court of common pleas upon a learned opinion by Judge Wilson, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called 'Wilson's Bar,' which had been created by alluvion upon land formerly contained within the boundaries of an island called Little Tinnicum, but which at some time had been worn away by the ocean. The court say: 'The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was de-

stroyed by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water if it was regained either by natural or artificial means, it continued to belong to the original proprietor.' 'The earth deposited on it became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion.'" (Pages 434, 435.)

The Delaware decision referred to (*Morris v. Brooke*, Del. Com. Pl., July, 1815) has been printed in volume 53 of the American Reports, at page 215.

In the recent case of *Hughes et al. v. Heirs of Birney et al.*, 107 La. Ann. 664, 32 South. 30, the principle under consideration was applied to land uncovered by the recession of the waters of "Lake Centennial" from a portion of De Soto point, opposite Vicksburg. The so-called lake was an enlargement of the Mississippi river which was formed by a cut made through the tongue of land in 1876. The water was drawn off, and the lake gradually filled up, by the river making another cut to a point further down the stream in 1898. The opinion was based on the standard authorities, and the syllabus reads:

"If, after submergence, the water disappears from the land, either by gradual retirement, or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary-lines, the proprietorship returns to the original owner."

In the case of *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941, it was said:

"It is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon." (Page 245.)

The same rule applies to titles held by the United States.

"Island No. 42 in the Missouri river, within the present state of Missouri, was surveyed by the United States in 1820, and then contained about fifty acres. Subsequently during floods it was submerged, and a portion of the surface was washed away; but on the subsidence of the waters a portion of it reappeared, and at no time was it washed away to the level of the bed of the river, a channel remaining between the island and the west bank of the river. About 1880 the river cut a new channel, commencing above the island, and returning to the old channel below it, making a curve to the eastward, which enclosed about 1100 acres, and leaving the old channel and the island dry. Thereafter plaintiff entered the island as public land, and received a patent therefor according to the original survey. Under the law of Missouri the title of riparian owners on a navigable stream extends only to the water-line. *Held*, that the title of the United States to the island was not lost by the erosion or submergence, and that, by its conveyance after it reappeared on the reliction of the waters, plaintiff took title thereto with the additions made by alluvion and accretion." (*Widdicombe v. Rosemiller*, 118 Fed. 295, syllabus.)

It is suggested that the right to reclaim submerged land can be asserted only when the riparian proprietor owns to the thread of the stream, but no reason is offered in support of the suggestion, and none is apparent. If through some catastrophe the river make its bed upon private land the burden should fall as lightly upon the private owner as possible. It is sufficient for the state that control be retained over the stream for the preservation of its public highway character. More than this the state ought not to take. Whatever the riparian owner lost should not be withheld when the water recedes and the need of public supervision is at an end. Whether originally he had or had not some land already under water cannot affect his rights. The land when restored is his own because avulsion affects neither boundaries nor titles. Proprie-

torship is not lost in the portion covered, and when it rises to the surface, whether by the deposit of alluvion or a change in the channel of the river, dominion re-attaches as if it had never been suspended; and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases. By a failure to discriminate between the effects of avulsion and ordinary erosion counsel for defendants have been led into an error respecting the prevalence of the doctrine of submergence and reappearance in the region through which the Missouri river flows. Nowhere has it been repudiated where the facts have required its application.

Such being the law and the facts, the avulsion of 1867 did not disturb the boundary between the state of Missouri and the state of Kansas, and the boundaries of the Armstrong grant as they existed when the partition suit was commenced were not changed. The land under the new channel of the river, the island and the shoals beyond the island still belonged to those who owned the soil before the flood. This land has been identifiable from the time the high water subsided, and the limits of the entire tract as they were known in 1867 have been proved in this action. The owners are entitled to reclaim it, and to have it partitioned, unless they have lost title to it in some manner or are debarred from asserting their rights upon some ground suggested by the defendants.

It is of course idle to assert that the partition proceedings conclusively prove the fact to be that the proprietors of the Armstrong grant had no more land in July, 1867, than the 200 acres which were divided. There is fair ground to argue that the allottees are estopped to claim title to more, but the physical existence of a portion of the earth's surface cannot be annihilated by writing up a court record to that effect. It is plain that the surveyor measured a tract of land surrounded by three streams, two of them at least at

flood stage, and found 200 acres of land out of water. The partition commissioners believed that the two rivers had permanently appropriated the remainder of the tract described in the petition, and in effect so reported. The retirement of the waters of the Missouri river and the restoration to its owners of a large body of land not included in the report were not contemplated. The court and the parties acted upon the circumstances as they then appeared, and closed the case before the river went down. Ordinary sagacity is to be imputed to them. They were mistaken, and the report, false in fact because based upon conditions erroneously believed to be perpetual, does not stand in the way of the truth.

It is the law that courts will not allow one cotenant to vex those having estates in common with him with a multiplicity of suits for partition, and ordinarily all the joint property must be included in one suit. But if they own two tracts they may voluntarily divide one of them, or they may ask the court to divide one of them, without depriving themselves of the right or the court of jurisdiction subsequently to apportion the other. Nor will relief be denied them if acting in good faith they should overlook a tract.

"It is true that a petition for a partition of a part of an estate held by tenants in common will not be entertained against the objection of any person interested. Ordinarily, a petition of this kind should include the entire estate held in common; but it does not follow, if by mistake, or by the consent of all the tenants, a partition has been made of a portion of their estate, whether by order of the court or otherwise, that the court is powerless to divide the remainder on a petition of one or more of the tenants in common. It would be a harsh rule that, after a division of a part of an estate, partition of the remainder could never be ordered by the court. When parties have acted innocently and fairly in making or obtaining a division which does not cover all their estate, there is no reason why the law should not aid them when they ask for a division of the remainder." (*Barnes v. Boardman*, 157 Mass. 479, 480, 32 N. E. 670.)

Fowler v. Wood.

(See, also, *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972.)

Likewise, if parties have acted innocently and fairly, and a portion of the estate described in the petition and ordered to be partitioned has been omitted from the report of the commissioners under a mistake as to the facts, there is no reason why, upon discovery of the true state of affairs, they should not have the right to bring suit in equity to enforce the decree as to the remainder as the exigencies of the case and the interests of the parties require (*Bank v. Kingman*, 62 Kan. 571, 64 Pac. 65, and authorities there cited; *Wadhams et al. v. Gay*, 73 Ill. 415), or else be permitted to avail themselves of the more direct remedy of an ordinary suit for partition of the omitted part, in which the equitable right to relief may, under the practice in this state, be fully investigated. The enforcement of any other rule would breed deserved contempt for the formalism of the law, and prove it to be a tyrant over the fortunes of men rather than a servant in the accomplishment of their just and blameless desires. Conceding to the partition proceedings that for which the defendants argue—the effect of mutual deeds—still if parties are mistaken as to the quantity of land they actually own, and the disparity is great enough to challenge the attention of a court of conscience, relief may be granted.

“Where plaintiff and his two cotenants attempted to partition their land under a mutual mistake that it only consisted of seventeen acres, when in fact they owned fifty-two acres, and one of them refused to execute deeds, and thereafter defendant purchased the land except plaintiff’s interest, claiming ownership of the entire fifty-two acres except the five and two-thirds acres first deeded to plaintiff, there was such disparity between the quantity of land believed by all the parties to exist and that which they actually owned that plaintiff was entitled to relief on the ground of mutual mistake, and hence a judgment in partition awarding plaintiff an equal one-third of the remainder of the land was proper.” (*Cartmell v. Chambers*, 54 S. W. [Tex. Civ. App.] 362, syllabus.)

The principle upon which this decision is based is fundamental in the law of contracts.

"In cases of mutual mistake going to the essence of the contract it is by no means necessary that there should be any presumption of fraud. On the contrary equity will often relieve, however innocent the parties may be. Thus if one person should sell a messuage to another, which was at the time swept away by a flood or destroyed by an earthquake without any knowledge of the fact by either party, a court of equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract." (1 Story's Eq. Juris., 13th ed., § 142.)

The same principle should govern if the conditions were reversed and the parties innocently but erroneously believed the messuage had washed away. The head-notes to the report of the case of *Ross v. Armstrong*, 25 Tex. (Supp.) 354, in volume 78 of the American Decisions, page 574, give the gist of the decision as follows:

"Under joint adventure between holder of head-right certificate and locator to secure patent to government land, and to divide the land when acquired, if, after securing the grant and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by older title, the partition is one upon a mistake of facts from which equity will relieve.

"It is a general rule in equity that an act done or contract made under mistake or ignorance of material fact is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error."

The obligation to abide a judgment and refrain from a second suit is affected by the same considerations:

"There is no doubt respecting the general correctness of the proposition expressed in the maxim, '*nemo debet bis vexari pro una et eadem causa.*'

"This rule, however, is not of universal application.

The origin and object of the rule were the prevention of the vexations incident to a multiplicity of suits, which the law, equally as much as equity, abhors.

"The principle above asserted finds more familiar expression in the statement that a party shall not split his cause of action.

"Now, it is quite obvious, that such prohibition *presupposes knowledge* of the constituent elements of the cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does not require what is impossible, then it must needs follow, that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done. Any other conclusion would be reached only through sanctioning the rankest injustice.

"In *Farrington v. Payne*, 15 Johns. 432, the question is asked: 'Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?' Undoubtedly it would. But in such a case, where the owner is ignorant of the extent of his loss, would it not be far more outrageous to allow a recovery of *one* barrel, to prevent the recovery of the remaining nine hundred and ninety-nine?

"This question will meet with an affirmative response in every honest heart." (*Moran v. Plankinton et al.*, 64 Mo. 337, 338.)

(See, also, *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69; *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.)

A mistake in a division line in a decree of partition originating in the report of the referees which was confirmed without objection will be corrected in equity. (*Smith v. Butler*, 11 Ore. 46, 4 Pac. 517.) Equity will likewise take jurisdiction to correct a decree of foreclosure from which a lot has been omitted by mistake. (*Snyder v. Ives*, 42 Iowa, 157.) And the fact that the cause in which a mistake occurs has been taken to the supreme court and the judgment affirmed will not defeat the exercise of such power. (*Partridge & Co. v. Harrow and Harrow*, 27 Iowa, 96, 99 Am. Dec. 643.)

It is true that the partition proceedings are conclu-

sive in reference to the nature and extent of the titles of the respective parties. The decree that they are tenants in common cannot be impeached to show that one or more of them owned in severalty. Nor can any of them take advantage of a second proceeding to make a claim for compensation for improvements which should have been asserted in the first instance. (*Forder v. Davis*, 38 Mo. 107; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. 90; *Spitts v. Wells*, 18 Mo. 468; *Burger v. Beste*, 98 Mich. 156, 57 N. W. 99; *Cane v. The Rock River Canal Company*, 15 Wis. 179; *Janes v. Brown*, 48 Iowa. 568.) So, if the commissioners had established a right of way to some of the allotments another could not now be claimed, and if a strip of land had been left undivided for the purpose of furnishing to some of the allottees free access to their premises the fact could not now be disputed. (*Carey v. Rae*, 58 Cal. 159; *Miller v. The City of Indianapolis et al.*, 123 Ind. 196, 24 N. E. 228; *Turpin et al. v. Dennis*, 139 Ill. 274, 28 N. E. 1065.)

In the case of *Miller v. The City of Indianapolis et al.*, *supra*, it was said:

"In their report to the court the commissioners reported that they had divided the land intended for partition into lots, blocks, streets, and alleys, and in their report of partition they informed the court that they had assigned to each of the parties interested in said land his or her share in the same in severalty. No person examining these proceedings would be led to believe that any portion of the land described therein was left undivided, but, on the contrary, when examining the plat in connection with the report of the commissioners in partition, and the judgment of the court thereon, would be led to the belief that the strip in controversy was intended as a sixty-foot street, furnishing an outlet for the blocks abutting thereon. . . . The property adjoining this strip has passed into the hands of third parties. . . . To permit the appellant to say now that this strip was left by the commissioners as undivided land, and was not intended as a street, would be obviously unjust to those who purchased the property on the faith of the plat

and the partition proceeding. We do not think the court erred in refusing to admit this offered testimony." (Pages 206, 207.)

None of these cases, however, which are referred to because cited by counsel for defendants, reaches to the marrow of this controversy, which relates not to what the commissioners' report includes but to what it disregarded. The report shows that 200 acres, and no more, of the land described in the petition were partitioned. A flood prevented the division of the remainder. The commissioners led the court and the parties to believe that the omitted territory had washed away. It was under water at the time, and remained so until the next year. The parties were not at fault in relying upon the statement of the commissioners as true. They were all, however, mistaken. The mistake involved the existence of a large portion of the subject-matter of the suit. Belief in its non-existence led them to take no further account of it. Therefore, under the ancient and well-established principles of equity jurisprudence, the plaintiffs are entitled to relief unless the defendants will be deprived of some right to the land; and under the liberal rules of procedure prevailing in this state the question may be determined in an action for the possession and partition of the tract excluded from the former report.

The defendants cite the leading authorities to the effect that when a private individual grants property belonging to him, and bounds it generally upon a stream, the presumption is he does not intend to reserve any land between the upland and the stream, and if his property extend beyond the water-line the presumption is the grant will carry title as far as he owns. The subject is discussed in volume 3 of Farnham on Waters and Water Rights, section 852. As stated by the author just referred to (section 855), the presumption ordinarily indulged is rebuttable, the question being purely one of intention. When the intention is ascertainable from the face of an instru-

ment or a record, other evidence is not admissible, and under the well-understood rule the court must make the interpretation and not the jury.

The full intention of the court and the parties to the partition proceeding is clearly expressed. No land whatever north of the Miller survey line was partitioned or conveyed, for the stated reason that none remained. It had washed away. The meaning is as clear as if the line had been established at a granite escarpment instead of a navigable river. In the theory of the law one form of earth sculpture is as enduring as another. The bank of a river is a monument the same as the face of a cliff. The presumption is that it does not change, and dominion may be limited as conclusively by a river-bank as by any other natural object. The allotments were intentionally made proportional to a residue of 200 acres, and the proposition that the design was that the six allottees whose proportional shares touched the river should, because of that fact, receive some fifty acres more of unpartitioned common land is not worthy of discussion. No land was reserved between the partitioned land and the river. Lot 18 was first conveyed by a description limited as follows:

"As set apart to the Union Pacific Railway Company, Eastern Division, by the judgment and decree of court in the case of Thomas Ewing, jr., *et al.*, v. William Weer *et al.*, at the April term, 1867, of the first judicial district in and for the county of Wyandotte, Kansas, numbered on the appearance docket of said court 911, as remains of record and on plat in cause numbered 18."

Lot 16 was first conveyed as "the same land designated as lot 16, as shown on the plat in case No. 911, Thomas Ewing, jr., *et al.*, v. William Weer *et al.*, in the first judicial district court, Wyandotte county, Kansas, and set apart to said Swope in said suit, the papers and records in which case are here referred to for description of said lot 16." Lot 15 was first conveyed

by deeds which limited the grant to a part of lot 15 in the plat in the partition suit of Thomas Ewing, jr., *et al.*, v. William Weer *et al.*, such plat being on file in the clerk's office of the first judicial district of Kansas, in Wyandotte county. A further reference in these deeds to a plat of the city across the Kansas river, which by its own outlines and by the certificates of the surveyor and the dedicating party excludes this land, added no certainty to the specific description already given; and to say that the decorative sketch upon this plat—no doubt satisfactory to the artistic taste of the draftsman—was seized upon by the grantor as the indisputable mark by which he could evince a determination to give to James F. Joy land which Joy was trying to keep covered by the water of a navigable river involves a flight of fancy which the court hesitates to attempt. Other primary conveyances of partition allotments are equally conclusive. No purpose to deed undivided interests in other land owned by numerous tenants in common can be interpolated.

Some of the defendants make no point that their deeds carried with them title to undescribed land by implication, and the position of the others is quite inconsistent with the very substantial and meritorious claim that they were purchasers of tracts bordering upon a navigable river whose bed belonged to the state, and hence that they took title only to its margin. (*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617.)

It is entirely clear that several of the defendants made their purchases from a desire to secure a location upon the main navigable channel of the Missouri river. Believing they had secured a permanent frontage of that character, they have expended fortunes in the improvement of their estates. To be cut off from the river is an incalculable hardship, and the plaintiffs will not be allowed to interfere in any wrongful way

with the riparian rights of the defendants. What, then, are the riparian rights of the defendants? Manifestly those of access to the stream, accretions to their shores, and land left by the reliction of the water from such shores.

From the findings of the jury it fairly appears that the building of the water-works dike deflected the main channel of the Missouri river from the land of the defendants, and that none of their land protruded northward, either by accretion to it or by the recession of the water from it, beyond the line of the Miller survey. The little that is lacking in the findings is abundantly supplied by the evidence given in connection with that upon which the findings are based. It is to the effect that the water company drove a double row of piling across the main channel of the river flowing between the island and the riprap bank, obstructing the current and diverting it to the north side of the island. Sand and sediment settled below the dike and formed a bar across the channel, which then commenced to fill up. Because the current had always scoured the riprap bank the progress of accretion while the channel was filling was from the island toward that bank, until a slough, and then pools of water next to that bank, were all that remained of the stream. After the water-works dike was constructed the city sewer was extended to reach flowing water. Later the harbor line was established at the end of the dike, to which an addition had meantime been made; considerable reclamation work and dumping of material into the stream helped to clog it, but much of plaintiffs' land was uncovered by the initial work of diversion.

It is useless to discuss the irreconcilable conflicts in the testimony bearing upon these important questions. They have been settled by the findings and verdict of the jury adversely to the defendants. All the evidence in the 3000 pages of the record favorable

to the plaintiffs is brought to the aid of the findings and the verdict. It is abundant to support every claim the plaintiffs make, and the court is now concerned with nothing but the rules of law governing the case.

If the title to the bed of the river had been in the state, and had not remained in the plaintiffs because of the avulsion of 1867, the piling in question would have constituted a purpresture, abatable by a suit in equity at the instance of the state. (*Revell v. The People*, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257.) As it is, it was an obstruction to navigation and a public nuisance. Besides this the deflection of the river by means of it invaded the private right of every individual entitled to the flow of the water past his land. The water company had the right to protect its land against inroads of the stream; it had the right to secure the 100 feet of accretion to its land; and it had the right to erect all improvements necessary to secure and promote commerce, navigation, fishing, and other uses of the stream as navigable water. But it could not destroy the stream itself. All the courts agree that even wharves, which are indispensable to navigation, cannot be extended beyond the line of navigability and will not be endured if they constitute a nuisance in fact. (*City of Madison v. Mayers and others*, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, and note, p. 642, 65 Am. St. Rep. 127.)

The claim of the water company, stripped of all sophistry, reduces to the demand that it may remove the stream from its channel to some remote locality and then appropriate the plaintiffs' land in order to obtain access to the water; and the claim of the other defendants, similarly denuded, is that because the water company has preyed upon them they are licensed to prey upon the plaintiffs. Manifestly such is not the law. The syllabus of *Halsey v. McCormick*, 18 N. Y. 147, reads:

"Where the water is diverted by artificial means,

and not imperceptibly, from the land of a proprietor bounded by low-water mark, he acquires no title to the derelict bed of the stream."

In the opinion it was said:

"McCormick deepened the bed of the stream on the south side, and placed stones along the center so as to confine the water in the channel thus deepened, and by this means the land in question was left bare. He may have been guilty, by these acts, of a violation of the riparian rights of the plaintiff or his grantors, but I know of no rule of law which would constitute an illegal act of the kind a transfer of the title." (Page 149.)

In *Lewis v. Lumber Company*, 113 N. C. 55, 18 S. E. 52, the area of an island in a swamp had been enlarged by drainage. It was said:

"Such enlargement of the original island by artificial means was not an accretion that inured to the plaintiff's benefit, and, if not, it was competent as in all such cases to show the original low-water line as defining the limits of the island when granted. Tiedeman, § 685 *et seq.*; Malone, Real Prop. 253." (Page 61.)

In volume 1 of the third edition of Wood on Nuisances, section 494, the text reads:

"Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses, for the protection of his land from the inroads of the sea. . . . But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor."

In the cases of *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002, and *Whyte v. St. Louis*, 153 Mo. 80, 54 S. W. 478, the trustee of a riparian owner, and later the assignee of the rights of such owner, sought to recover from the city itself accretions formed by the acts of the city and by a railroad company over which the plaintiff had no control, and declarations of law in favor of the plaintiff were made. In the case of *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7, a wrongful structure was given to

the riparian owner, in front of whose land it had been erected, as an accretion. The court said:

"The wrong-doer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrong-doer, the accretion attached to his soil as an extension thereof. (*Ledyard v. Ten Eyck*, 36 Barb. 102, 125; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581; Gould, Waters, §§ 123, 124, 128, 148, 158; Angell, Tide-waters, 249.)"

It is equally clear that the defendants other than the water company cannot keep for their own use accretions to plaintiffs' land. Peter may not be plundered to recompense Paul. Especially is this true since the other defendants had a right to redress against the water company. In the case of *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88, a riparian owner filled up the channel of a river running between an island and the land of an opposite proprietor. The party wronged was awarded damages for the injury special to himself, the court holding the maxim, *sic utere tuo ut alienum non lædas*, to be clearly applicable. Upon a subsequent appeal of the same case the court said:

"The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon him. The manner in which the diversion is brought about is not important. It might be accomplished by means of elaborate works arranged to carry the stream elsewhere, or it might be effected by filling up the channel so as to compel it to seek another. The result accomplished and the injury inflicted would be the same. The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrong-doer to repair the wrong done him by restoring the stream to its channel or making com-

pensation for its loss." (*Williams [Appellant] v. Fulmer, Appellant*, 151 Pa. St. 405, 414, 25 Atl. 103, 31 Am. St. Rep. 767.)

In the case of *City of Georgetown v. The Alexandria Canal Company, &c.*, 37 U. S. 91, 9 L. Ed. 1012, the syllabus reads:

"The Potomac river is a navigable stream, or part of the *jus publicum*; and any obstruction to its navigation would, upon the most established principles, be a *public nuisance*. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. A court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because, to that extent, he has suffered beyond his portion of injury, in common with the community at large."

Citations of authority to the same effect might be multiplied. Therefore the fact that the navigable channel of the river has been diverted from alongside the defendants' land by the means described gives them no right to appropriate the plaintiffs' premises in order to preserve their riparian privileges. They must acquire title to the coveted tract in some manner recognized by law.

Upon their own theory of the case, the defendants' purchases being bounded upon a navigable river, they took no title beyond the bank, the bed of the river belonging to the state. If so they could obtain title to no part of the bed of the stream, nor to any land formations upon the bed of the stream, except by grant, which they did not receive, or by the processes of accretion and reliction. It is a matter of no concern to the defendants who may own that which is not theirs; and since the title of the plaintiffs was not taken away by the catastrophe of 1867 the defendants are limited

to precisely the same methods of acquisition as if the bed of the river belonged to the state.

Accretions must consist of deposits formed against, and added to, the bank. In Lord Hale's treatise, "*De Jure Maris et Brachiorum Ejusdem*," it is said:

"Let us now come to the *maritima incrementa*, viz.: *Alluvio maris; recessus maris; et insula maris*.

"(1) For the *jus alluvionis*, which is in an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees."

Chapters 5 and 6 of this valuable tract, from which the quotation is made, are reprinted in volume 16 of the American Reports, at page 54 *et seq.* The definition of Mr. Justice Gantt, given in *Lammers v. Nissen*, 4 Neb. 245, notes this characteristic:

"An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by dereliction as when the river shrinks back below the usual water-mark; and land so formed by addition belongs to the owner of the land immediately behind it." (Syllabus.)

In the case of *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, it was said:

"According to the cases we have cited, the high-water mark, as thus defined, being the boundary-line of the riparian owner in this state, is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party." (Page 435.)

In the case of *Holman v. Hodges*, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367, a bar formed on the bed of the Missouri river, which increased in size until it became fit for agriculture and finally joined the shore. The opinion reads:

"Without setting out the evidence in detail, it is enough to say that the formation of the bar or island has been entirely distinct from any accretion to the

shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and was gradually added to by accretion or reliction until an island of the proportions mentioned was formed. Not only is this true, but the conclusion seems inevitable from the circumstance shown that the additions to plaintiffs' land, whether from accretion thereto or the receding of the waters, have resulted from the formation of the island. Its existence undoubtedly changed the main current of the river, and by its growth to the northeast gradually cut off the stream formerly flowing between it and the shore. Whether this be true, however, need not now be determined. It is enough for the purposes of this case that the land beyond the channel last mentioned was formed independently of plaintiffs' land. It then never became part of their lots through the process of accretion or reliction. . . . It is said that, even though it [the state] may have owned the island when surrounded by water, that title moved from beneath it as the river receded, and the land became plaintiffs' as soon as connected with shore. It is conceded that no authorities have been found announcing such a doctrine, and we have been unable to discover any case awarding a riparian owner land because connected to his own, save when this has occurred through the imperceptible accretion or the reliction thereof by the gradual receding of the waters." (Pages 715, 716.)

In the case of *Linthicum v. Coan*, 64 Md. 439, 2 Atl. 826, 54 Am. Rep. 775, it was said:

"If the land in question was formed by gradual accretions extending from the shore into the river, it would belong to the riparian proprietor; and this would be the case notwithstanding the fact that by the influence of floods and freshets large deposits of mud may have been made in the bed of the river. These deposits would, of course, materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water; and when this is the case, it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result. On the other

hand, if land was formed in the river, and extended inwards toward the shore, it would be the property of the plaintiff, with all its accretions." (Page 454.)

The decisions in *Posey v. James*, 7 Lea (Tenn.) 98, and *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274, were based upon the same propositions. In the case of *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964, the court had under consideration the rights of parties to an island which sprang up in the Sacramento river, originally a wide expanse of navigable water, and by its own accretions finally closed one of the channels that separated it from the shore. The patentees of the shore claimed it. In the opinion it was said:

"The accretions were to the island, and not to the lands described in plaintiffs' patent. It is a familiar doctrine of the common law that the owner of land bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which, from the same cause, may be gradually annexed to it. . . . It is also elementary that if an island springs up in a navigable stream, it belongs to the sovereign, and not to the owner of the land on either of the banks of the stream. So in this case the principle is the same, whether the island existed at the time of the confirmation of the Mexican grant, or was afterward formed in the river. If the accretions had been to plaintiffs' land, and had gradually extended to the island, the plaintiffs would have been the fortunate ones, and the accretions so added to theirs would have been theirs in law." (Page 550.)

In *King v. Young*, 76 Me. 76, 49 Am. Rep. 596, holding that a mussel-bed over which the water flows at every tide cannot properly be called an island but should be denominated flats, under a colonial ordinance, it was said:

"It seems to be settled both in England and in this country that the land of a riparian proprietor may be increased by accretion. This is not denied by the defendant's counsel. But he contends that the increase must be gradual, and from the shore outward; that if

an island forms at a distance from the shore, and then, by its own growth, extends inward till it reaches the shore, such new-made land will not become the property of the owner of the shore; and in this we think he is correct. He then contends that a mussel-bed is an island, if it first commences to form at a distance from the shore, and there first shows itself above the surface of the water at ebb-tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore, so as to leave no water between it and the shore at ebb-tide. In this we think he is wrong. We think a mussel-bed over which the water flows at every tide cannot properly be called an island. We think such formations constitute what are called flats; and, by virtue of the ordinance of 1641-'47 belong to the owner of the adjoining land, if within a hundred rods of high-water mark and so connected with the shore that no water flows between them and the shore when the tide is out." (Page 79.)

The principle under consideration holds in the case of reliction.

"The formation by accretion or reliction must be imperceptible, and must be made to the contiguous land so as to change the position of the water's margin or edge." (*Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300, syllabus.)

(See, also, *Cox v. Arnold*, 129 Mo. 337, 341, 31 S. W. 592, 50 Am. St. Rep. 450.)

If the space between the mainland and an island be reduced to a slough, which fills up in such a manner that the two bodies of land join, the respective owners will be entitled to the accretions to their shores. If the slough fills up from the bottom, and the accretions do not begin at the sides, the boundary is the center of the slough, as it was before the water left it. (*Buse v. Russell*, 86 Mo. 209; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746.) If an island be separated from the mainland by the channel of a river which becomes dry the same rule obtains.

"It will be noted that refused instructions 4 and 5 announce the proposition that if the land in contro-

versy was originally formed in the Missouri river as an island or sand-bar with a channel between it and the mainland belonging to plaintiff, and that by accretions to said bar or island on the south side it finally extended to plaintiff's land on the south bank, or if by the recession of the river from this intervening channel after the formation of the bar or island the bar and the mainland became connected, then plaintiff became the owner thereof as an accretion. This instruction was clearly erroneous in that it ignores the fundamental idea upon which the title to accretions is based, namely, that they must be the imperceptible or gradual accretions to the plaintiff's lands, or the gradual receding of the river therefrom. If the accretions were to the island on the south side, and to the mainland on its north side, and by a change of the river they were thus brought together, such a union of the two tracts did not make the island an accretion to the mainland." (*Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233.)

"Suppose the channel of the river between an island and the mainland is left dry by the water, and entirely filled up with deposits of mud, and the island and mainland are at last one continuous tract of land, could the owner of either claim the entire tract? Certainly the newly formed land would belong to the United States, or it would be divided between the opposite owners, upon the common-law principle, applicable to non-navigable streams, of each going to the thread of the channel, as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one, *pro hac vice*, or rather as being converted, at the slough between the island and the shore, into a non-navigable one. In any event the owner of the shore could not claim both the alluvion and the island, nor, *vice versa*, could the owner of the island claim the tract on the bank, with its accessions by alluvion." (*Benson v. Morrow*, 61 Mo. 345.)

If the plaintiffs' land had not been devastated by a violent and convulsive process whose operation was manifest to all who desired to gaze upon it, and its original banks had been worn away by ordinary erosion to the Joy deed line, the defendants could acquire title to it only in the manner described in *Peucker v. Canter*, 62 Kan. 363, 63 Pac. 617; that is, by the outward ex-

pansion of their shore-line across it. These principles hold whether the channel separating the plaintiffs' land from that of the defendants' filled on account of the water-works dike or from some other cause.

The defendants argue that the so-called island was a mere sand-bar; that an island, to be worthy of the name, must have become elevated above the bed of the stream far enough to make it fit for agricultural purposes; and that the riparian right of accretion can attach to nothing less dignified. It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign, in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. (*Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504; *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964; *Holman v. Hodges*, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367.)

Before it will support vegetation of any kind a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon its borders would make it more valuable, no reason is apparent why the law of accretion should not apply. It is not before the court to say what primitive formation will carry the right to accretions, but the ability to support crops certainly is not the single test. In any event the rights of the parties to this litigation are to be determined as of the time the formation in the river and that against the shore came

together. Before then the defendants could not claim title. At that time there is no doubt such formations, whether sand-bar, island, restored land, or something else, were as properly the subject of dominion by the plaintiffs as by the defendants who seized them.

The supreme court of the state of Missouri, within whose jurisdiction the lower course of this river lies, has been called upon to deal with almost every phase of this subject. Its opinions are in full accord with the principles of law elsewhere recognized. Three brief quotations are quite pertinent:

"If the island was washed away, in whole or in part, after it was surveyed and then reformed on the same bed, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away and the land sought to be recovered was made by deposits to and against the survey of the mainland, then such deposits became the property of the owner of the survey." (*Buse v. Russell*, 86 Mo. 209, syllabus.)

"The sole issue made by the pleadings is whether the lands sued for were accretions to plaintiff's shore-land. If they were and are, he is entitled to them without reference to whether they now extend beyond what was once the center line of the main channel. If they were not formed to his land on the bank of the river by gradual accretion of land thereto or by a gradual reliction of the adjoining bed of the river by the receding of the waters, then he is not entitled to recover, whether the lands be called an island or a sand-bar or by any other designation." (*Perkins v. Adams*, 132 Mo. 131, 140, 33 S. W. 778.)

"In view of all this evidence it is plain that whether island 45 remained substantially as originally surveyed, or whether it was washed away and afterward reformed on its original site, it is too plain for discussion that what is termed '*the island*' now is not an accretion to section 21 or section 16. The doctrine of accretion will scarcely admit of *jumping a slough forty to sixty yards wide*. In a word, there is nothing saltatory about accretion." (*Crandall v. Smith*, 134 Mo. 633, 640, 36 S. W. 612.)

Of course the plaintiffs were obliged to recover upon

the strength of their own title. This they did by connecting themselves with the allottees of the Armstrong grant under the partition proceedings of 1867. The views of the law herein expressed were substantially given to the jury by well-drawn instructions. The period of time within which an owner may reclaim land after it has been submerged is not a question for determination in this action. The plaintiffs show a title good against the defendants. The state has not intervened, and whether it has any rights is immaterial to the present decision. If it really holds the paramount title the defendants cannot take advantage of the fact. (*McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822.)

One hundred and ninety-eight special questions were answered by the jury. The court has considered them all, and finds them to be harmonizable with each other and with the general verdict. Many pitfalls were prepared for the jury by using the terms "washing away" and "washed away," but they made themselves entirely clear with reference to the precise effect of the action of the water upon the plaintiffs' land. The argument that there was not sufficient land remaining when the partition suit was commenced from which an island could be cut off and leave 208 acres was doubtless submitted to the jury, the proper tribunal to determine the fact.

Eighty-eight instructions were given to the jury, and numbers of requests for instructions were refused. The instructions given and those refused have been examined, and no error prejudicial to the defendants is discovered. In view of the findings of fact several matters argued relating to instructions become immaterial. Defenses were fairly submitted. The jury evidently gave the water company full benefit of its special defense that the accretion in front of its lot abutted upon the Kansas and not upon the Missouri River bank. Unwarranted assumptions of fact were

not made in the instructions. It was the duty of the court, and not of the jury, to interpret the partition proceedings.

The petition names a large number of persons as plaintiffs, and describes them as cotenants of the tract sued for. The verdict was in favor of all these parties. The petition further names a number of persons as defendants who are described as cotenants with the plaintiffs. The verdict was also in favor of "those defendants who are tenants in common with the plaintiffs," evidently meaning those named in the petition. The right to the possession of the land described was a matter of common interest to many persons. One tenant in common may recover the entire estate from a trespasser for the benefit of all. Any fractional interest in land is sufficient upon which to base a judgment of ouster against a trespasser. This being true, the plaintiffs in error suffered no material injury because the jury did not catalogue the names of the prevailing defendants and specify the precise proportional share of each plaintiff and prevailing defendant. The plaintiffs in error are not at all solicitous because the names of some five or six persons appear to have been written in the judgment whose right to recover may not be supported by the record, but they seek to overturn the entire judgment because the verdict is in the form described. This they cannot do. Some of the plaintiffs below may be injured. The plaintiffs in error cannot be.

Those who were given acre quantities in the original partition suit had no interest in the unpartitioned common lands when their demands for specific measures were satisfied. Therefore they and their successors have no interest in the litigation. The land recovered is sufficiently described in the verdict.

The 170 assignments of error in the briefs have been duly considered, and none of them requires the case to be tried again. The foregoing observations, which

Lewark v. Parkinson.

already transcend the proper limits of a written opinion, express the views of the court with reference to those which are of greatest importance.

The judgment of the district court is affirmed.

All the Justices concurring.

W. H. LEWARK *et al.*, as Partners, etc., v. SOPHIA PARKINSON.

No. 14.404. (85 Pac. 601.)

SYLLABUS BY THE COURT.

1. **COMMON CARRIERS—Owners of Hacks—Injury to Passenger.** Proprietors of hacks and cabs carrying passengers for hire are liable for all injuries caused by their failure to provide suitable vehicles, safe horses and harness, and a competent, careful driver.
2. ——— **Unsafe Horses — Defective Harness — Emergency — Time for Deliberation.** When the proprietors of a line of hacks and cabs engaged in carrying passengers for hire are sued for damages for injuries sustained by a passenger in a runaway caused by the team's becoming frightened and the harness breaking, an instruction is properly refused which charges that carriers are not liable for a mistaken exercise of judgment on the part of their servants in an emergency, nor for a failure of such servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation.
3. **DAMAGES—Personal Injuries—Expenses.** Expenses incurred by an injured passenger, which resulted from the injuries, including compensation for services of nurses, are proper elements of damages in an action against the carrier in such a case, notwithstanding the services were performed by a member of the family of the injured person, if the services were necessary and the charges reasonable.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed May 12, 1906. Affirmed.

Lewark v. Parkinson.

J. H. Keith, and Charles Bucher, for plaintiffs in error.

Benson & Harris, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: Plaintiffs in error are proprietors of a line of hacks and cabs operating at Coffeyville as common carriers of passengers and baggage between railway depots and elsewhere in the city. On the 7th day of March, 1902, Mrs. Parkinson, defendant in error, who was seventy-two years of age, was a passenger in one of the cabs, on her way from one depot to another, and was injured in a runaway. She brought this action to recover damages for the injuries sustained. The jury returned a verdict in her favor for \$400, of which they allowed \$150 for expenses incurred by reason of the injuries, and the remainder for pain and suffering. Plaintiffs in error seek to reverse the judgment, and assign numerous errors.

Defendant in error at the time of the accident was traveling from her home at Pomona, in Franklin county, to visit her sons, who lived at Wagoner, in the Indian Territory. It was claimed in her petition, and established by the evidence, that she was the only passenger in the cab when the team started to run, and that she looked out and saw that the driver had dropped or in some way lost the lines. She says that he jumped from his seat and ran to the door of the cab, which was at the rear, and opened the door and held his hand to assist her in getting out; that while attempting to get out she was thrown down and received the injuries complained of. The answer set up contributory negligence. Upon the trial the driver testified that the horses became frightened at a large piece of paper which the wind carried into the street in front of them; that one of the tugs broke, and then one of the lines broke, and he jumped off. He denied

Lewark v. Parkinson.

that he opened the door for defendant in error, or that he did anything to induce her to get out, but claimed that he was endeavoring to prevent her from doing so.

The injuries to Mrs. Parkinson were serious enough to prevent her from continuing her journey. She was carried into a private residence near by and cared for by strangers. Her sons came at once from Wagoner, and, while one remained to care for her, the other went back to Wagoner, returning the next day with his family physician, who took charge of defendant in error. The court admitted evidence of the expense incurred by the sons in these trips, and in taking their mother from Coffeyville to Wagoner, where she remained several weeks, and also of the expense of one of the sons in taking her later to her own home. These expenses and the time of the sons in nursing and caring for defendant in error were allowed by the jury as a part of the expenses incurred. It is seriously contended that as the sons were in duty bound to care for their mother, and because it appeared from the evidence that the wages of one of the sons, who was employed as a clerk in a store, were paid him by his employer during the time he claimed to have cared for his mother, it was error for the jury to allow defendant in error for these items of expense.

If defendants below are liable at all they are liable for the necessary expense caused by the injury to the passenger, including traveling expenses made necessary by the circumstances in which defendant in error was left by the accident. It became necessary for her sons to come to her and take care of her to the end of her journey, and, again, for some one to travel with her to her home. Reasonable compensation for nurse hire and attendance was a proper item of recovery, notwithstanding the persons who performed the services were relatives who might have been bound to take care of her without compensation, if she paid or be-

Lewark v. Parkinson.

came liable for the expense and the service was required. In *Brosnan et al. v. Sweetser*, 127 Ind. 1, 26 N. E. 555, where the services were rendered by members of the family, it was said:

"If this be done by some good friend or member of the family, who donated his services, that is the good fortune of the appellee, and a matter with which the persons liable have no concern. If she had paid ten times the true value of such services she could only have recovered what such services were reasonably worth." (Page 8.)

(See, also, *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744, 39 N. W. 884; *Kendall v. The City of Albia*, 73 Iowa, 241, 34 N. W. 833; *The Pennsylvania Company v. Marion*, 104 Ind. 239, 3 N. E. 874; *Varnham v. The City of Council Bluffs*, 52 Iowa, 698, 3 N. W. 792.)

Error is claimed because the court refused to permit defendants to prove that the driver was a competent, experienced driver of horses, and that his reputation in that respect was good. As well might a railway company seek to defend an action for injuries to a passenger by proving that the engineer whose negligence caused a wreck was a capable and experienced engineer, and that he bore a good reputation as such.

The theory of an unavoidable accident was not pleaded as a defense, and there was nothing in the evidence to warrant the court instructing in reference to it. The jury found in answer to a special question that the injuries were not the result of an unavoidable accident. It is complained that the court erred in refusing to give the following instruction:

"You are instructed that carriers are not liable for mistaken exercise of judgment on the part of their servants in an emergency, nor for a failure upon the part of their servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation."

This was properly refused; the negligence of the carrier in permitting the emergency to arise is lost sight of in the instruction. Moreover, it was not a correct statement of the law with respect to the liabilities of a common carrier for injuries caused to a passenger by the negligence of the carrier. In *Sawyer v. Sauer*, 10 Kan. 466, the trial court instructed the jury as follows:

"That a stage-coach proprietor who carries passengers for compensation is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight. He is bound to furnish gentle and well-broke horses, skilful, prudent and sober drivers; and the smallest degree of negligence in these particulars will render such proprietor liable for any injury to passengers therefrom."

This instruction was conceded to be correct in the abstract by counsel for plaintiff in error in that case, and was approved by this court, and afterward cited with approval in *Topeka City Rly. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754. The law imposes certain duties upon the carrier, and it is from these that his liabilities flow. He is not an insurer against all defects. He is, however, liable for all injuries caused by his failure to provide suitable vehicles, safe horses and harness, and a competent, careful driver. It was said in *Crofts v. Waterhouse*, 3 Bing. (Eng.) 319, 321: "If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." (See, also, *Budd v. United Carriage Co.*, 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279, and cases cited.)

The testimony of the driver established the carriers' negligence. He testified that one of the horses "would run away if he got a chance." The opportunity came, the horse ran away, the harness broke in two impor-

Cue v. Johnson.

tant places, the driver jumped off, and the passenger was injured.

The doctrine of unavoidable accident and the reputation of the driver were never seriously involved in this case. The judgment is affirmed.

All the Justices concurring.

C. E. CUE *et ux.* v. L. G. JOHNSON.

No. 14,417. (85 Pac. 598.)

SYLLABUS BY THE COURT.

1. **CONTRACTS—Time of the Essence—Forfeiture.** Courts abhor forfeitures, and will resort to any reasonable rule of construction to avoid them. But when in a contract for the sale of real estate it is stipulated that time shall be of the essence of the agreement, and a forfeiture upon default is provided for, such contract will be upheld and enforced, unless under the circumstances shown it would be grossly inequitable.
2. ——— **Right to Forfeit Must be Promptly Asserted—Waiver.** When the right to declare a forfeiture under such a contract exists the party entitled thereto must assert his right promptly, and his acts relating thereto must be unequivocal, and inconsistent with the continuance of the contract, or he will be held to have waived such right.

Error from Trego district court; JAMES H. REEDER, judge. Opinion filed May 12, 1906. Reversed.

W. E. Saum, for plaintiffs in error.

J. J. Schenck, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: This suit was brought in the district court of Trego county to cancel a contract for the sale of real estate which the plaintiff had executed to the defendants, who had made default in payments due thereon.

The contract sought to be canceled was executed June 13, 1903. By it the grantor agreed to convey 320 acres of land, upon payment by the grantees of \$4505.10, as stipulated. Payment was to be made in instalments. Time was by express terms made of the essence of the contract. Under a prior agreement of sale the grantees had been in possession of the land one year, and had paid to the grantor \$500. The balance remaining due on the sale of the land at the date of the contract sought herein to be canceled was the aggregate sum therein stated, \$4505.10. Of this amount the grantees had paid \$822.03. On May 1, 1904, an instalment of \$133 became due; it was not paid; the grantor declared the contract at an end and demanded possession of the land, which being refused he brought this suit. Upon a trial a decree was granted in favor of the plaintiff, and the defendants now ask that such decree be reversed.

By the terms of this decree the grantor retains \$1322.03 paid on the purchase-price, and also recovers the possession of the land. The grantees have been in possession two years. Upon these facts the plaintiffs in error claim: (1) That the defendant in error is not entitled to a forfeiture, and (2) if he was entitled thereto, it has been waived.

This court, in the case of *National Land Co. v. Perry*, 23 Kan. 140, held that where parties to a contract for the sale of real estate make time of the essence of the contract a forfeiture will be upheld as stipulated, unless under the circumstances of the case it would be grossly inequitable. At the same time courts do not favor, but on the contrary they abhor, forfeitures, and will resort to very liberal rules of construction to avoid them. (*English v. Williamson*, 34 Kan. 212, 216, 8 Pac. 214; *Hartley v. Costa*, 40 Kan. 552, 559, 20 Pac. 208; *Ritchie v. K. N. & D. Rly. Co.*, 55 Kan. 36, 39 Pac. 718; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *Grigg v. Landis*, 21

N. J. Eq. 494; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378.) In the case last cited, in speaking of a contract where time was made of the essence of the agreement, and provision was made for a forfeiture in case of default, the court said:

"A court of equity will not declare a forfeiture unless compelled to do so. It violates every principle of justice to take the property of one man and give it to another without compensation upon a simple failure to pay at the day, where there had not been gross laches." (Page 680.)

It seems to be a well-established rule in such cases that the party claiming the benefit of a forfeiture must show himself to be strictly within the terms of the instrument which confers that right. He must act promptly in asserting his claim, and his acts relating thereto must be positive, unequivocal, and inconsistent with the continuance of the contract. (*Faw et al. v. Whittington*, 72 N. C. 321; 29 A. & E. Encycl. of L. 677, 681; *Boone v. Drake*, 109 N. C. 79, 13 S. E. 724; *Hipwell v. Knight*, 1 Y. & C. Ex. [Eng.] 401.) In the case last cited Baron Alderson said:

"The result of the cases on this subject seems undoubtedly to be that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation; and that whenever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to this part of his agreement, he is to be taken to have waived it altogether." (Page 418.)

In addition to the facts before stated it appears that all payments had been made according to the contract prior to May 1, 1904. At that time interest to the amount of \$133 became due. A short time before that date—on April 28 or 29—defendant C. E. Cue informed the plaintiff that he would be unable to pay promptly, asked for further time, and offered additional security for the delay. The plaintiff declined, stating that he needed and wanted the money when due.

On Monday, May 2, Cue saw the plaintiff and again reported his inability to pay. They talked over the situation; plaintiff claimed that by the failure to pay the contract was forfeited, and Cue admitted such to be the case. The plaintiff stated to Cue that he wanted the money or the property. Cue then said he thought he could raise the money by Thursday or Friday of that week, and would be back Saturday with the money or the papers. At this time the plaintiff did not expressly consent to any further time, but he then intended to wait until Saturday and take the money if it should be offered at that time. Cue failed to come back on Saturday, and on the following Monday (May 9) the plaintiff went to the home of the defendants, who resided on the land in controversy. Upon arrival he said to the defendant C. E. Cue: "You did not come down Saturday as you agreed." Cue replied: "No; I changed my mind." Plaintiff then demanded possession of the land.

This suit was commenced May 14, 1904. On May 24 plaintiff filed an amended petition, in which for the first time he tendered back the unpaid notes given for the land; the defendants tendered the full amount then due to the plaintiff, which was refused, and the amount was deposited with the clerk, where it has since remained, for the plaintiff. During the trial, in October, 1904, the defendants tendered the further sum of \$530, to apply upon the \$614.54 which would become due November 1, 1904, and offered in open court to let judgment go against them at that time if the remainder of the amount which would then become due were not paid. The offer was refused.

We find that the plaintiff by his conduct at and about May 2, 1904, when the forfeiture is claimed to have occurred, waived his right thereto. When Cue informed the plaintiff that he was unable to pay and wanted more time, stating that he thought he could possibly raise the money by Thursday or Friday, and

Cue v. Johnson.

if he could would return with it on Saturday, the plaintiff, if then determined to insist upon the forfeiture, ought to have said so in positive and unequivocal terms. He ought to have informed Cue that he need not make any effort to raise money, as the time had passed and the money would not be received on Saturday if tendered. On the contrary, he carefully refrained from giving express consent to further time; but in his own mind did consent, and decided to wait until Saturday and then take the money if offered, and if not to take back the unexpressed consent and waiver formed in his own mind and insist upon the forfeiture. He permitted Cue to engage in another effort to raise the money in the belief that, if secured, the plaintiff would accept it. This attempt to hold on to the forfeiture, while at the same time seeming to waive it, does not show such candor and fairness as the circumstances demanded. He ought to be held to this waiver.

This makes it unnecessary to consider the question whether the amount paid by the defendant was so great as to make a forfeiture grossly inequitable or not. It is apparent, however, that the defendants are ready, able and willing to carry out their contract, and it would be a loss and hardship to them if deprived of the opportunity.

The judgment of the lower court is reversed, with direction to enter judgment for the defendants for costs.

All the Justices concurring.

A. J. AVERY, as Administrator, etc., v. THE UNION
PACIFIC RAILROAD COMPANY.

No. 14,456. (85 Pac. 600.)

SYLLABUS BY THE COURT.

73	563
76	815
77	475
78	563
78	54
80	400

PRACTICE, DISTRICT COURT—*Demurrer to Evidence—Direction of Verdict.* It is error for a trial court to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case.

Error from Riley district court; SAM KIMBLE, judge.
Opinion filed May 12, 1906. Reversed.

Waters & Waters, for plaintiff in error.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for
defendant in error.

The opinion of the court was delivered by

GREENE, J.: George Avery was run over and killed on a public crossing by one of the Union Pacific Railroad Company's trains. A. J. Avery, as his administrator, sued to recover damages therefor. The court overruled a demurrer to the plaintiff's evidence. The defendant introduced its evidence, and then upon its request the court directed the jury to find a verdict for the defendant, upon which a judgment was rendered.

The error assigned is that the court directed a verdict for the defendant and rendered judgment thereon. Numerous acts of negligence were charged in the petition, among which was the failure of the engineer of the train which ran over Avery to sound the whistle eighty rods from the crossing. Plaintiff introduced some evidence tending to show that the whistle was not sounded at a point eighty rods from the crossing, while the testimony on the part of the defendant very strongly tended to show that it

Avery v. Railroad Co.

was so sounded. Whether it was or not was a material fact, upon which the evidence, when all in, was conflicting. The rule controlling where a demurrer is interposed to evidence applies in directing a verdict. If there is any substantial testimony tending to sustain the material facts contended for by either party, as against such party the trial court should overrule a demurrer; and where all of the evidence has been submitted on both sides, and there is a conflict upon any material question of fact, the cause must be submitted to the jury.

As suggested, there was evidence introduced by the plaintiff tending to show that the railroad company did not sound the whistle at a point eighty rods from the crossing upon which Avery was killed, and presumably it was because of this that the court overruled the demurrer to the plaintiff's evidence. This evidence still remained in the case. Notwithstanding the defendant had offered testimony to the contrary, and notwithstanding that evidence might have been sufficient to satisfy a jury and did satisfy the court that the defendant's engineer had complied with the law in this respect, and notwithstanding the court felt that it would be compelled under the evidence, in case a verdict should be returned for the plaintiff, to set it aside and grant a new trial, it was nevertheless the duty of the court to submit the cause to the triers of the facts. It is only where it can be said that the plaintiff has wholly failed to introduce any substantial evidence in support of some material point in his case that a court is authorized either to sustain a demurrer to his evidence or direct a verdict for the defendant. The jury are the triers of the facts, and whenever the testimony has reached such a point that it must be weighed and conclusions deduced therefrom the jury alone must make the deductions in the first instance, and not the court. (*Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112; *K. P. Rly. Co. v. Couse*, 17 Kan. 571; *Brown*,

Hamlin v. Railway Co.

Adm'r, v. A. T. & S. F. Rld. Co., 31 Kan. 1, 1 Pac. 605;
Jansen v. City of Atchison, 16 Kan. 358; *St. Jos. & D.*
C. Rld. Co. v. Dryden, 17 Kan. 278.)

The judgment is reversed, and the cause remanded.

All the Justices concurring.

JAMES HAMLIN V. THE KANSAS RAILWAY COMPANY.

No. 14,479. (85 Pac. 602.)

SYLLABUS BY THE COURT.

RAILROADS—*Failure to Complete a Track—Forfeiture of Right of Way.* A court cannot say as a matter of law that the mere failure of a railroad company for any fixed period to complete a track upon a right of way which it has acquired by condemnation works a forfeiture of its rights, where there has been no adverse possession.

Error from Wilson district court; **LEANDER STILLWELL**, judge. Opinion filed May 12, 1906. Affirmed.

Mikesell & Wilson, for plaintiff in error.

A. M. Harvey, and *T. J. Hudson*, for defendant in error.

The opinion of the court was delivered by

MASON, J.: In 1882 the Kansas Railway Company condemned a right of way across Wilson county. A grade was constructed, but no track was ever laid. In 1903 James Hamlin, as owner of the fee of a portion of the tract so appropriated, brought a suit to quiet title against the railway company, upon the ground that whatever rights it had acquired with respect thereto had been forfeited. A trial was had upon oral evidence, a part of which tended strongly to show an abandonment by the company and a part of which had some tendency to the contrary. The court decided in

favor of the defendant, and the plaintiff prosecutes error. No special findings were made and it is impossible for this court to know upon what view of the facts the decision was based. The judgment must therefore be affirmed unless it can be said that the mere fact that no railroad was ever completed compelled a different result.

It may be assumed that there was no adverse possession by the plaintiff, for the evidence does not conclusively show it. Where there is no adverse possession non-user does not of itself work an extinguishment of the company's right. (23 A. & E. Encycl. of L. 705.) Of course the legislature might have provided that a failure to complete a railroad within a stated time should have that effect, but no claim is made that the Kansas statute is to be construed as fixing such a limit. In the absence of a statutory limitation, a court cannot say as a matter of law that, irrespective of all other considerations, the mere failure of the company to complete its track within any fixed period operates as an extinguishment of all rights acquired by the condemnation proceedings. (3 Ell. Rlds. § 931; *Nicomien Boom Co. v. North Shore etc. Co.*, 40 Wash. 315, 82 Pac. 412, and cases there cited.)

It results that the judgment must be affirmed, and it is so ordered.

All the Justices concurring.

THE STATE LIFE-INSURANCE COMPANY V. JOHN N. JOHNSON.

No. 14,491. (85 Pac. 597.)

SYLLABUS BY THE COURT.

1. **CONTRACTS—Induced by Fraud—Suit for Rescission—Parol Evidence.** In a suit to avoid a written contract and to recover money paid thereon on the ground that plaintiff had no opportunity to read the contract and was induced to execute the same by false and fraudulent representations, the rule that parol testimony will not be received of conversations had between the contracting parties prior to the signing of the contract, for the purpose of disputing, altering or changing the terms of the contract, does not apply.
2. ——— **Fraudulent Representations—Question of Fact.** A defense to such a suit that the false and fraudulent representations alleged to have been made were so palpably false or unreasonable that the party claiming to be injured could not have been, and was not, deceived thereby ordinarily raises a question of fact for the jury, and not a question of law.

Error from Jefferson district court; CYRUS F. HURREL, judge. Opinion filed May 12, 1906. Affirmed.

STATEMENT.

DEFENDANT in error sued the plaintiff in error in the district court of Jefferson county to recover \$182.12 paid by him to it on a contract of insurance, which he claimed was procured through fraudulent representations. Judgment was rendered for the full amount claimed by the plaintiff, and the insurance company brings the case here for review.

Phinney & Raines, and *Charles F. Coffin*, for plaintiff in error.

H. B. Schaeffer, *W. A. Killey*, and *Daniel L. Stanley*, for defendant in error.

The opinion of the court was delivered by

SMITH, J.: The first error complained of is the overruling of the demurrer filed by the insurance company to the amended petition. As the principal ground therefor the company claims that the representations alleged to have been falsely made by the insurance company's agent were so palpably unreasonable that they were not likely to deceive, and hence the allegation that the plaintiff did rely upon the same is not admitted by the demurrer. The general rule is that a demurrer to a pleading admits, for the purposes of the hearing thereof, the truth of the facts alleged in the pleading; and while there may possibly be exceptions to this rule courts will not carefully weigh the degree of credence which a particular person may have given to what appears to be an unreasonable story told to him for the purpose of defrauding him. It comes with poor grace for one defending against an alleged fraudulent representation to say that the representations were so palpably false and unreasonable as to be absolutely incredible. At most, it is rather a question of fact for the jury than a question of law for the court.

The other objections to the petition, except the fifth, are somewhat in the same line. The fifth objection is that the plaintiff did not allege that the policy he received was worth less than he actually paid for it, and consequently that he was not damaged and is not entitled to relief. This is not an action to recover damages, but a suit to avoid a contract for fraud, and to recover the money procured through the fraud. We think the petition stated a cause of action, and that the demurrer thereto was properly overruled.

We have examined the specifications of error assigned on the introduction of evidence. As to the witness Johnson, the only evidence to which our attention is called that we think worthy of comment is the an-

swer, "No, sir," to the question: "State whether you ever received from defendant company the kind of a policy that was represented would be sent to you by this man Marks." This was a conclusion of fact which should not have been drawn by the witness, but the conclusion to be drawn should have been left to the jury. The representations said to have been made by Marks, however, were detailed to the jury, and a copy of the policy was produced in evidence, and we cannot say that the defendant was prejudiced by the answer. In fact, the jury were practically left to draw their own conclusions, as the witness does not seem to have detailed in what respect he considered the policy was of a different kind than that promised.

The plaintiff in error further complains of the testimony of Barnes, Huddleston, Henderson, and Younkin. We have been unable to discover anything in the evidence of Barnes that was really material to the case, or that could have aided the plaintiff or injured the defendant, except a letter from the insurance department to Johnson, which was identified by Barnes and admitted in evidence over the objection of the defendant; but the court struck this out, and instructed the jury to disregard it. Otherwise it would have been material error.

We digress here to remark that the practice permitted in this trial of allowing an attorney, after the court had sustained objections to certain questions, to make oral offers, in the presence of the jury, of what he expected to prove by the witness, and to assert that he had plenty of evidence to sustain the offer, is not a good one. The court, however, remedied the evil, so far as possible, by telling the jury to disregard the offer. The better practice is to require offers of proof to be made in writing. Many jurymen are not able, at the end of a long trial, to discriminate between the matters heard on the trial which are submitted to them as evidence and those matters which are not so sub-

mitted. The production of evidence should therefore be made as simple as possible, and counsel should not be allowed, during the introduction of evidence, to make assertions with reference to the strength of their evidence or the weakness of their opponent's. We cannot say, however, that after the corrections made by the court the defendant was materially prejudiced in this respect.

As to the evidence of the witnesses Huddleston, Younkin, and Henderson, we think it was admissible for the purpose of showing the design and plan of the agent, Marks, in procuring the insurance application from Johnson, under the rule of evidence laid down in section 304 of volume 1 of Wigmore on Evidence; but of course such evidence should not have been considered in determining what representations the agent made to Johnson. If, however, the evidence was admissible for any purpose it should not have been excluded, and if the insurance company desired to have its application limited it should have requested an instruction defining the purposes for which the evidence could be considered and for which it should not be considered.

We think there was sufficient competent evidence not only to justify but to require the overruling of the demurrer to the plaintiff's evidence. It must be borne in mind that this was not an attempt on the part of the plaintiff to vary or contradict the terms of the written contract, but was a suit to annul and set aside a written contract and to recover the money paid thereon, on the ground that the contract was procured through fraud. The real issue in this case is whether or not the agent, for the purpose of inducing Johnson to take the insurance, made material misrepresentations as to the cost or conditions of the policy, or as to the payments therefor, or the benefits to be derived therefrom, and whether Johnson did rely thereon and was deceived and induced thereby to take such insur-

 Railroad Co. v. Kansas City.

ance and make the payment thereon. If this question is answered in the affirmative, and it appears that the company accepted the benefits of the fraud practiced by its agent, the contract should be set aside and the plaintiff should recover.

We have examined the instructions complained of, and think the questions in issue were fairly presented to the jury and that the jury were not misled. The issues were practically all issues of fact. There seems to have been a fair trial, and the verdict of the jury is supported by sufficient evidence. The judgment of the district court is affirmed.

All the Justices concurring.

 THE UNION PACIFIC RAILROAD COMPANY V. THE CITY
OF KANSAS CITY *et al.*

No. 14,499. (85 Pac. 808.)

 THE UNION PACIFIC RAILROAD COMPANY V. THE CITY
OF KANSAS CITY *et al.*

No. 14,500. (85 Pac. 808.)

SYLLABUS BY THE COURT.

CITIES—Public Improvements—Petition—Protest—Final Determination—Injunction—Limitation of Action. Where a landowner who claims to be a resident of a city of the first class files with the city clerk a written protest against a petition for the improvement of a street, and the petition is regular on its face and purports to be signed by one-half of the resident owners of the land abutting upon the street to be improved, and the mayor and council consider the petition and protest and order the petition spread upon the journal, and proceed to cause the improvements to be made, their action is a final and conclusive determination of the sufficiency of the petition; and such landowner cannot question the validity of the proceedings in a suit to enjoin the assessments unless such suit is brought within thirty days from the time the amount of the assessment is ascertained.

73	571
778	336
73	571
82	862

Railroad Co. v. Kansas City.

Error from Wyandotte court of common pleas; WILLIAM G. HOLT, judge. Opinion filed May 12, 1906. Affirmed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error.

Edwin S. McAnany, city counselor, and *Ralph Nelson*, city attorney, for defendants in error.

The opinion of the court was delivered by

PORTER, J.: Plaintiff in error brought these suits to enjoin the assessment and collection of special-improvement taxes for the grading, paving and curbing of Fifth street from Euclid avenue to Central avenue, in Kansas City, Kan. From a judgment refusing a permanent injunction plaintiff brings this proceeding in error.

The cause was tried upon an agreed statement of facts. The plaintiff's petition claimed that prior to the adoption of the resolution declaring the improvements necessary there had not been filed with the city clerk a petition signed by the resident owners of one-half of the land fronting or abutting upon the street asking that such improvements be made; that plaintiff, being a resident owner of a majority in front feet of the property liable to be taxed under the improvement, duly filed its written protest against the improvement, notwithstanding which the council proceeded to pass the ordinances and caused the improvements to be made.

A special objection to the validity of the proceedings was also made upon the ground that plaintiff was the owner of an irregular-shaped, unplatted piece of ground, a portion of which abuts on Fifth street a distance of 1725 feet. The other portion of said irregular-shaped tract is land which does not abut upon the street improved, but extends for a distance of about 1400 feet parallel with Fifth street, but distant there-

from 200 feet. This irregular tract was assessed as one entire tract of land.

Kansas City is a city of the first class. The claim is made that the thirty-day statute of limitations (Gen. Stat. 1901, § 766) bars plaintiff from raising any of the contentions relied upon to defeat these special-improvement taxes. The agreed statement of facts recites that the suit was commenced more than thirty days after the time of the ascertainment of, and levy of the assessment for, the cost of the improvement complained of; also, that the mayor and council had done all things necessary, so far as form is concerned, upon which to base the assessment.

The validity of an assessment for special improvements authorized by the mayor and council of a city of the first class, when the proceedings upon their face are regular in form, cannot be attacked by a suit to enjoin the collection and assessment unless the suit be brought within thirty days from the time the amount of the assessment is ascertained. (Gen. Stat. 1901, § 766; *Simpson v. Kansas City*, 52 Kan. 88, 34 Pac. 406; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300; *City of Argentine v. Simmons*, 54 Kan. 699, 39 Pac. 181; *Arends v. City of Kansas City*, 57 Kan. 350, 46 Pac. 702; *Kansas City v. Kimball*, 60 Kan. 224, 56 Pac. 78.)

Plaintiff is a corporation organized under the laws of Utah, with its principal office in that state, but claims that, under the ruling in *The State v. Bogardus*, 63 Kan. 259, 65 Pac. 251, it is a resident of any city or county in which it operates its railway or exercises corporate franchises. It seeks to avoid the effect of the thirty-day statute of limitations by the argument that the mayor and council were without jurisdiction, and all the proceedings in reference to the improvement and the ascertainment and apportionment of the cost thereof were void, because the city and its officers had a list of the property-owners and a map showing the location of the land, and in addition knew

Railroad Co. v. Kansas City.

that the plaintiff was a resident of the city and owned a majority of the front feet of the land involved and had filed its written protest against the improvement. On the other hand it is contended that the plaintiff is not a "resident owner" of land in Kansas City, within the terms of section 730 of the General Statutes of 1901. The further contention is made that, if plaintiff be conceded to have been a resident at the time the petition for the improvements was presented, the determination of the mayor and council that the petition was signed by the requisite number of resident owners is conclusive; and that the railroad company lost its rights by failing to bring a suit within thirty days after the ascertainment and apportionment.

Without passing upon the question of whether a railway corporation which is a citizen of another state, with its principal office in that state, can be considered a resident of any city in this state in which it operates its railway or exercises corporate franchises, we are of the opinion that the determination by the mayor and council that a petition asking for the improvement contains the requisite number of signers is final and conclusive, unless a suit be brought within thirty days after the ascertainment and levy of the taxes. This also covers mere irregularities in the detail of the apportionment and levy of the tax, such as is claimed occurred with reference to a portion of the irregular tract of land, which was within less than 300 feet of the street improved.

The action of the mayor and council in determining the sufficiency of a petition has been said not to be final and conclusive in the absence of legislative provision to that effect. (2 Dill. Mun. Corp., 4th ed., § 800.) Our statute contains such a provision (Gen. Stat. 1901, § 733), which reads as follows:

"When hereafter the mayor and council of any city of the first class shall have ordered any petition presented to them for the paving, curbing or guttering of any street to be spread upon the journal, said order

Scott v. Bankers' Union.

shall in all respects be a final determination and conclusive evidence as to the sufficiency of such petition."

Plaintiff filed its written protest against the making of the improvement. It claimed to be a resident of the city, and it knew of all the objections to the proceedings which it now sets up against the assessments after the improvements have been made. Its claim for relief does not appear to be any stronger upon equitable grounds than that of an absent, non-resident owner who was in entire ignorance of the proceedings, but whose property was assessed and all right to object cut off by this thirty-day statute. After the expiration of thirty days the validity of the assessment cannot be attacked for any purpose, when the proceedings are regular on their face; and here the regularity is conceded.

The two cases were submitted together, and are in all respects similar, except that the question with respect to the assessment of the irregular tract of land is not involved in No. 14,500. The judgments are affirmed.

All the Justices concurring.

W. T. SCOTT V. THE BANKERS' UNION OF THE
WORLD *et al.*

No. 14,510. (85 Pac. 604.)

SYLLABUS BY THE COURT.

1. CORPORATIONS — *Fraternal-insurance Association — Power to Issue Notes.* An incorporated fraternal-insurance association, organized under a charter which does not expressly confer the power to issue promissory notes, has no implied power to do so, when such authority is unnecessary to enable the association to exercise the powers expressly given or to accomplish the purpose of its creation.
2. ——— *Dealings with a Corporation—Notice of its Powers.* Every person dealing with a corporation or with its obli-

73	575
e76	294
e76	760

tions is bound to take notice of the power possessed by such corporation and of the purpose for which it was created.

3. ——— *Bona Fide Purchaser of Ultra Vires Corporate Note.* The purchaser of a promissory note executed by a corporation not having the legal power to issue such an obligation cannot recover thereon from such maker, even when the note is taken in good faith and for value.
4. ——— *Incapacity of Corporation Does Not Release the Other Joint Maker.* A person who is the joint maker of a promissory note with a corporation which does not have the power to issue such an obligation may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation.

Error from Shawnee district court; Z. T. HAZEN, judge. Opinion filed May 12, 1906. Modified.

STATEMENT.

IN 1901 the Bankers' Union of the World was a fraternal beneficiary association, organized under the laws of the state of Nebraska. Its principal officers were E. C. Spinney, president, and C. M. Chittenden, secretary. At that time the National Aid Association was also a fraternal beneficiary association located in Topeka, Kan.; and its principal officers were L. R. Lewis, president, S. D. Cooley, secretary, and M. Ware, medical director.

The National Aid Association was very much reduced financially, having about \$100 in its mortuary fund and about \$2400 in its expense fund. It owed its officers nearly \$5000 for past-due salaries, and there were claims due against its mortuary fund aggregating \$34,330. The officers of these associations held a conference in October, 1901, for the purpose of effecting a consolidation of the organizations. Arrangements were considered, and written agreements signed, which were satisfactory to the officers. Efforts were then made by them to obtain the consent of the associations to the plans which had been agreed upon.

The board of directors of the Bankers' Union of the

Scott v. Bankers' Union.

World, which had all the power legally conferred upon the association, authorized its president, E. C. Spinney, on October 23, 1901, to make such arrangements as "he deems necessary and proper to effect such consolidation." In pursuance of this authority E. C. Spinney confirmed the former arrangements made with the officers of the National Aid Association, whereby it had been agreed between them that Lewis, Cooley and Ware should use their influence in securing a transfer of the management of the National Aid Association to the management of the Bankers' Union of the World; that they should surrender all claims, for back salary and otherwise, held by them against the National Aid Association, and assist as far as possible in obtaining the final amalgamation of the two orders; in consideration whereof the Bankers' Union of the World agreed to assume the liabilities of the other association, not exceeding the sum of \$34,330, and pay to said Lewis, Cooley and Ware the sum of \$10,000 in thirty equal monthly instalments, beginning November 1, 1901, if the consolidation was completed at that time, and if not, then on the first day of the next month after it was completed. These instalments were each evidenced by a promissory note executed by the Bankers' Union of the World, by its president, E. C. Spinney, and by him personally. Ten of these promissory notes were made payable to the order of Ware, and the same number to each of the other obligees—Lewis and Cooley. The notes were in all respects negotiable in form.

In furtherance of this arrangement Lewis and Cooley called a meeting of the directors of the National Aid Association, resigned from their positions as president and secretary of the order, and to fill the vacancies made by such resignations the directors elected Spinney and Chittenden, who at once assumed the management and control of that association. Afterward a meeting of delegates sent from the subordinate lodges

of the National Aid Association throughout the country met at Topeka, Kan., and after full discussion thereof ratified and confirmed the acts which had been done in the direction of a consolidation of the associations, and ordered that proper steps be taken to complete such arrangements.

Spinney and Chittenden managed the National Aid Association as a separate organization until December 15, 1901, when they resigned, and the management devolved upon Elsie Buckman, acting secretary, who conducted the affairs of the order until January 8, 1902, when it passed into the hands of a receiver.

The promissory notes held by Lewis, Cooley and Ware which fell due November 1, 1901, were paid by Spinney, with checks drawn upon the funds of the National Aid Association. The notes which matured December 1, 1901, were not paid when due, and suit was brought thereon, but Spinney afterward settled the suit and paid the notes.

As a result of the attempted consolidation, the Bankers' Union of the World received nothing; its officers, E. C. Spinney and C. M. Chittenden, received nothing. The National Aid Association received nothing; its officers, Lewis, Cooley, and Ware, received the notes as above stated. In the transaction, however, they had resigned their offices, and faithfully worked to accomplish the purpose in view, as agreed by them.

M. Ware, the payee and holder of eight of the notes above mentioned, exchanged them for the home farm and the live stock thereon of the plaintiff herein. This farm is located in Hodgeman county, Kansas. The plaintiff gave to Ware a bond for a deed to the real estate, a bill of sale for the stock, and agreed to retain possession thereof and care for the same one year. On January 2, 1902, suit was brought on the note which became due January 1, 1902, and afterward by stipulation the other notes were added, so that this suit embraces the eight notes of \$333.33 each. The plaintiff

Scott v. Bankers' Union.

still retains possession of all the property deeded to Ware. The plaintiff took the notes in good faith, for full value, and without notice of the circumstances under which they were executed.

The Bankers' Union of the World was organized under the provisions of chapter 47 of the Laws of Nebraska of 1897. The title of the act contains the following: "An act defining fraternal beneficiary societies, orders or associations, and regulating the same, and to repeal," etc. The act in part provided:

"SECTION 1. A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government.

"SEC. 2. Such society shall make provision for the payment of benefits in case of death; . . . provided, the payment of such benefits in all cases shall be subject to compliance, by the member, with the contract, constitution, rules and laws of the society.

"SEC. 3. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such society shall be defrayed, shall be derived from beneficiary calls, assessments, or dues collected from its members."

Section 4 defines who may be beneficiaries.

"SEC. 5. Such societies shall be governed by this act and shall be exempt from the provisions of the statutes of this state relating to life-insurance companies except as hereinafter provided, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Section 6 defines where such associations may be served. Section 7 exempts the proceeds of a beneficiary certificate for debts of holder. Sections 8 and 9 provide the steps to be taken to obtain a permit to do business under this act. Section 10 provides reports to be made to the auditor of public accounts. Section 11 requires foreign associations doing business under

this act to appoint a person upon whom service may be made. Section 12 provides terms upon which such orders may do business in the state. Section 13 limits the right to solicit membership. Section 14 concerns contracts between a beneficiary and a member whereby the former is to pay the latter's dues. Section 15 permits transaction of business outside the state. Sections 16, 17 and 18 recite causes which forfeit the right to do business and provide penalties for violations of the statute. Section 19 requires examination of members by physician. Section 20 provides for the organization of new corporations under the act.

"SEC. 21. All societies, orders and associations contemplated in this act shall be exempt from the provisions of chapter 16 of the Compiled Statutes of 1885. . . . The moneys collected by any such society from its members, according to the plan or method provided in its constitution and by-laws, for the payment of death or disability claims arising under the terms of its beneficiary certificates, shall be kept separate and apart from the other funds of such society, and shall be used only in payment of such claims, and no part thereof shall be used by such society in payment of expenses of any kind or character."

Section 22 requires a copy of the constitution and by-laws to be filed with auditor. The constitution of the Bankers' Union of the World contains, *inter alia*, the following provisions:

"DIVISION 1.

"SEC. E. *How maintained.*—The expense of the fraternity shall be defrayed by a percentage of the premium income, per capita tax and membership and certificate fee upon every member thereof. The same shall be collected and forwarded to the Bankers' Union of the World by the subordinate lodges, and shall be placed in the designated funds. The amount available for general fund for expenses and the membership fees shall be established by the board of directors, but the amount of premium income so available shall not, after the first year of each policy, exceed the ratio of three dollars per \$1000 of life-insurance on a single policy, and a ratio of four dollars and fifty cents per

Scott v. Bankers' Union.

\$1000 in case of a joint policy, or a ratio of three dollars for each accident policy of the lowest amount provided for, all calculated per annum. To meet this expense the first premiums received on each policy by said Bankers' Union of the World shall be available till said limit is reached."

"DIVISION 4.

"SEC. F. *Duties of the supreme banker.*—The supreme banker shall receive all money belonging to the general, reserve and benefit funds of the order, and shall give a receipt when each payment is received. . . . He shall pay all orders on the reserve, benefit and general funds, signed by the supreme president and attested by the supreme secretary, keeping a separate account with each of the three funds."

"SEC. H. *Duties of board of directors.*—The board of directors shall have complete control of the financial affairs of the fraternity, shall protect the charter of the same and exercise its corporate powers as provided by the laws of the state of Nebraska. . . . It shall be the duty of the board of directors: . . .

(3) *Payment of claims.*—To authorize and order payment of all proper claims against the fraternity, and direct payments to be made from the general fund of such as may be properly paid therefrom. (4) . . . The supreme secretary shall not issue any order on the supreme banker for the payment of any claims unless such order shall have been first signed by the supreme president."

By sections I, J, and K, the general manager is authorized to publish an official paper for the membership, and to employ an attorney when necessary, compensation in each case to be fixed by the general manager.

"DIVISION 9.

"SEC. D. *Reserve fund.*—For the purpose of creating a reserve fund, to guard against poor risks, protect healthy members, equalize the cost to all, and absolutely insure the perpetuity of the union, all insurance in the Bankers' Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life based on his age at entry according to the American experience table of mortality, there shall

be deducted from the death benefit payable under such policy held by said member a sum equal to the amount of one payment (at the rate paid by the member) for each month of the unexpired period of such life expectancy, with four per cent. on the unpaid balance of such sum. Accident and disability benefits payable under all policies shall be subject to proportionate deduction. All such deduction made in payment of policies at times when the mortuary fund equals or exceeds \$10,000 over and above all claims on file and approved against said mortuary fund shall constitute a reserve fund. All such deductions in payment of policies made at times when the mortuary fund amounts to less than \$10,000 over and above all claims on file and approved against said fund shall be placed in the mortuary fund of the company. The reserve fund of the Bankers' Union of the World shall not, under any circumstances, be used for any purpose except to meet death losses in excess of six deaths per thousand members per year, and for the payment of old-age benefits to members over seventy years of age. It is declared to be the fundamental principle and policy of this union that no more than twelve premiums at the rate at entrance age shall be made in any one year for the payment of mortuary, disability and accident benefits and expenses of the union. But if for any cause now unforeseen and not anticipated the rate fixed at entrance according to age fails to produce the necessary amount, then it shall be the duty of the board of directors to order a special call, which shall be paid by each member to the secretary of his or her subordinate lodge within thirty days from the date of such call, which funds shall forthwith be transmitted by such secretary to the Bankers' Union of the World. Members failing to pay any special call within thirty days from the date of the said call of the same shall stand suspended."

Section A of division 1 of the by-laws provides, in substance, that the supreme lodge shall have exclusive charge of printing and furnishing lodge supplies, at prices fixed by the directors, the proceeds to go into the general fund of the supreme lodge.

In addition to the foregoing there are many other expenses provided for which are necessary to the ex-

Scott v. Bankers' Union.

istence of the order, and which it is necessary to pay out of the funds of the association.

E. C. Spinney is joint maker of the notes sued on with the Bankers' Union of the World, of which he was president. A copy of the note upon which suit was instituted is as follows:

"OMAHA, NEB., October 26, 1901.

"January 1, 1902, after date, for value received, we promise to pay to the order of M. Ware, at the office of Stebbins & Evans, 509 Kansas avenue, Topeka, Kan., three hundred and thirty-three dollars and thirty-three cents; interest at ten per cent. per annum after due until paid.

(Signed) THE BANKERS' UNION OF THE WORLD.
By E. C. SPINNEY, *President and General M.*
E. C. SPINNEY."

Indorsed as follows: "Pay to the order of W. T. Scott.
(Signed) M. WARE."

Overmyer & Overmyer, for plaintiff in error.

Edwin A. Austin, and *Otis E. Hungate*, for defendants in error.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced to recover upon the eight promissory notes obtained by the plaintiff from M. Ware, each being for the sum of \$333.33. The notes were given in consideration of services performed in an effort to effect a consolidation of the Bankers' Union of the World and the National Aid Association. One of the defendants, the Bankers' Union of the World, objects to the payment of the notes (1) because the purpose for which the notes were given was beyond the power of the association, which makes them void *in toto*; and (2) because the plaintiff is not in a position to claim the protection ordinarily due to an innocent holder of commercial paper, as he is still in possession of all the property that was the consideration for the notes and is secure from loss without such protection.

The plaintiff insists that a corporation having power to create debts or incur liabilities for any purpose whatever has the power to issue its promissory note therefor, and the purchaser of such note, in the absence of notice or knowledge to the contrary, has the right to assume that it was given for a rightful purpose; that defendant association has express power to provide many things that can only be obtained either by cash or credit, and to carry out the manifest purposes of the order it is necessary for it to have the power to contract debts for these essential purposes and issue its promissory notes therefor; that the plaintiff has delivered all of the property sold, and is in possession thereof merely as agent of the owner, and therefore cannot protect himself; and, further, that the defendant association, having received the services of the payee of the notes, and caused him to surrender his office, and receipt for past-due salary, is now estopped from denying its power to make the contract and execute the notes.

There are other questions presented, but they are minor to, and involved in, the principal ones mentioned, and in the view we have taken they are not material to the conclusion reached and need not be considered.

Corporations are created by law, and have such powers only as are expressly or impliedly conferred upon them. The charter of a corporation is the measure of its power. (7 A. & E. Encycl. of L. 695.) In the case of *Head v. Providence Insurance Co.*, 6 U. S. 127 (reprint, vols. 5-6, p. 150), 2 L. Ed. 229, Chief Justice Marshall said:

"Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting

its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers." (Reprint, vols. 5-6, p. 154.)

In the case of *N. Y. F. Ins. Co. v. Ely*, 5 Conn. 560, 567, 13 Am. Dec. 100, Chief Justice Hosmer said, when speaking of the powers of corporations, that "the law of its nature, or its birthright, in the most comprehensive sense, is such, and such only, as its charter confers." In the case of *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 11 Sup. Ct. 484, 35 L. Ed. 55, Mr. Justice Gray said:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." (Page 48.)

This is the generally accepted and recognized rule. The implied powers which a corporation has are only such as are necessary fully to carry out the powers expressly given and to accomplish the purpose of its creation. (7 A. & E. Encycl. of L. 699; *The People, ex rel., v. Chicago Gas Trust Co.*, 130 Ill. 268, 283, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 355, 38 Am. Rep. 594.)

In the case of *National Home-building Ass'n v. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245, Chief Justice Cartwright said:

"A corporation is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership, and if a power is claimed for it the words giving the power or from which it is necessarily implied must be found in the charter or it does not exist." (Page 40.)

It may therefore be said that as a general rule a private corporation possessing the powers usually con-

ferred has authority to issue promissory notes, either when authorized to do so in express terms, or when it is necessary to carry out other powers expressly given and is essential to the accomplishment of the purpose of its creation. But it may also be said that corporations may be created which do not have such power, either express or implied. Whether a given corporation has such power or not will depend upon the express provisions of its charter, and the purpose it was intended to accomplish. When a law whereby a corporation is created does not confer in express terms the power to issue promissory notes, such power will not be implied if it appears from the general scope of the law, and from the purpose to be accomplished by such corporation, that it is not essential to the proper exercise of the powers expressly conferred nor to the accomplishment of the objects for which the corporation was created.

Applying these principles to this case, we have concluded that the Bankers' Union of the World did not have power, either express or implied, to issue the notes sued upon. It was organized under the provisions of a statute enacted for the purpose of placing such associations in a separate and distinct class. By the express terms of this statute associations organized under it are excluded from the provisions of all laws relating to ordinary corporations and life-insurance companies. This indicates an intention to deprive them of the ordinary business powers incident to other corporations, and to withhold all power not expressly given.

This association was not organized for trading or business purposes, or to acquire profit in any way. It is without capital, and has no revenue. Its only financial resource is the voluntary contributions of its members. Its only business is to receive and disburse these contributions in accordance with the rules of the order. No power exists to enforce the payment of as-

sessments, but when they are voluntarily paid a fixed per cent. thereof is placed in a fund out of which all the expenses incident to the management of the order are to be paid. This fund is the sole means at the disposal of the officers of the association, and it is, and of necessity must be, an uncertain and conjectural quantity. The issuance of a promissory note, with no security for payment when due other than this fund, would be a very unbusinesslike transaction. It would seem like folly to permit any obligation of the association to be issued which exceeded the extent of this fund at the time of such issuance. An obligation payable upon the contingency that this fund would be sufficient might work no injury, but a promissory note negotiable in a commercial sense, payable absolutely, is wholly incompatible with the plans, resources and necessities of such an organization.

A law permitting a corporation of this character to issue such notes, and thereby deceive and entrap the unwary and credulous, would be open to serious criticism. It may be conceded that the legislature of Nebraska might confer such power upon such an association, but it should not be assumed to have done so until its language to that effect is so clear and explicit as to admit of no other reasonable interpretation. The statute under which the Bankers' Union of the World was organized, and the constitution and by-laws of that order, have been fully pleaded and constitute a part of the record in this case. The decisions of the Nebraska supreme court, so far as deemed applicable, have been cited in the briefs of counsel, and further to aid this court depositions of eminent lawyers in that state have been taken, wherein opinions have been given *pro* and *con* as to whether or not under this statute and the decisions and other laws existing in Nebraska the Bankers' Union of the World had the legal power to issue a promissory note. But, since we have the statute and reports before us, we have con-

cluded to follow our own judgment in the decision of this question.

It is familiar law that whoever deals with a corporation or buys its obligations is bound to take notice of the powers conferred by its charter, and the purposes for which it was created. When the plaintiff was about to purchase the notes in question he was charged with notice of the powers, express and implied, possessed by the Bankers' Union of the World, and was bound to take notice that it had no authority or power to issue such notes for any purpose whatever. Charged with such notice, he could not become the owner of the notes so as to be entitled to the protection usually accorded an innocent holder of commercial paper. (*Alexander et al. v. Cauldwell et al.*, 83 N. Y. 480, 485; *Jemison et al. v. C. S. Bank*, 122 N. Y. 135, 140, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 69 Neb. 220, 95 N. W. 819; *National Home-building Ass'n v. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; *The Franklin National Bank et al. v. Whitehead et al.*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; *Durkee v. The People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340.)

This conclusion disposes of the case so far as the Bankers' Union of the World is concerned, and makes it unnecessary to consider the question of estoppel on account of benefits received, as the plaintiff took the notes with notice of this infirmity and is not therefore entitled to the rights of an innocent holder. It seems, however, that this defendant received very little, if anything, of value out of the transaction. The scheme of consolidation failed. These notes were not to be paid unless it succeeded. It is true that the president and secretary of the Bankers' Union of the World, while in control of the National Aid Association, used

its funds in a way that might give just cause of complaint, but that association is not in this case. These funds were not transferred to the Bankers' Union of the World, nor used in any way for its direct benefit. They were used to defray the expense incurred in the furtherance of the scheme in which both associations were interested. The National Aid Association was insolvent and unable to pay the salaries due its officers, and the release thereof resulted in very little, if any, loss to them, and no advantage to the other association.

We think E. C. Spinney, the other maker of these notes, is liable thereon. He was personally, as well as officially, interested in securing the consolidation of the associations. But for his supposed personal financial responsibility nothing would have been done by the payees of the notes to secure the union of the two companies. He knowingly and voluntarily executed negotiable notes, and consented to their delivery. The transaction in which they were given was not unlawful, or contrary to public policy. The consolidation of such corporations might be desirable and useful to both associations, and proper and legitimate in every way. The officers of the National Aid Association did not attempt to sell out their company, nor to betray their trust; they only undertook to advise with and urge the subordinate lodges and members to consent to the proposed merger. This was proper. The National Aid Association could not exist alone very long, and any change which promised protection to its certificate holders was desirable. We think this effort on the part of the officers was not vicious, but commendable.

The notes are not enforceable against the other maker (the defendant corporation) simply because it had no power to execute them, and the plaintiff had legal notice thereof when he took them. The plaintiff, having bought these notes in good faith, and for value, and without notice of the circumstances under which they were given, is an innocent holder as against Spinney, and is entitled to recover thereon.

Railway Co. v. Wynkoop.

The judgment of the district court is affirmed so far as the Bankers' Union of the World is concerned, and reversed as to E. C. Spinney; and it is directed to enter judgment, upon the facts found by it, against E. C. Spinney, in accordance with the views herein expressed. The costs in this court are divided equally between the plaintiff and defendant Spinney.

All the Justices concurring.

73 590,
175 602

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *et al.* V. ALBERT L. WYNKOOP *et al.*

No. 14,524. (85 Pac. 595.)

SYLLABUS BY THE COURT.

1. INJUNCTION — *Closing of a Railway-crossing — Jurisdiction.* A suit of injunction to prevent the closing of an undergrade crossing of a railroad operates *in personam*, and is not one of those provided for in section 46 of the civil code (Gen. Stat. 1901, § 4476) which must be brought in the county in which the subject of the action is situated.
2. RAILROADS—*Contract with Landowner for Right of Way—Reservation.* A contract between the owner of land and a railroad company, in connection with a proceeding to condemn a right of way for a railroad, which reserved to the landowner an undergrade crossing as a means of access from one part of the farm to the other, and which was taken into account by the condemnation commissioners in the award of damages for the appropriation of the right of way, is binding upon both of the parties.

Error from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed May 12, 1906. Affirmed.

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiffs in error.

C. D. Walker, and J. L. Berry, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was a suit to enjoin the closing of an undergrade farm-crossing of a railroad. In 1886 the Chicago, Kansas & Nebraska Railway Company laid out a railroad and condemned a right of way across the farm of David Wynkoop. The route selected was between the buildings on the Wynkoop farm and the public highway. In a depression which extended from the buildings to the public highway a private roadway had been built for the accommodation of the owner and occupants of the farm. The railroad was laid out and built across this depression, and the plan of the railroad required a high embankment which extended eighty-five rods across the farm, the height of which was about twenty-five feet at the intersection of the private roadway. When the commissioners met to condemn a right of way over the farm the matter of passing from one side of the railroad to the other by the use of the private roadway was considered, and it was agreed between the owner and the representative of the railway company that an opening should be left for an undergrade crossing at the intersection of the private roadway; and the damages of the owner were assessed by the commissioners upon the understanding that he should have such a crossing at that point. The railroad was built in accordance with the plan, and a bridge constructed over the private roadway.

In 1891 defendant corporation acquired the railroad property, and in 1895 some negotiations were had between the railway company and the owner of the farm in regard to the narrowing of the passageway under the railroad and the substitution of an arch stone culvert for the bridge first built. No agreement was reached by them, however, and another bridge similar to the one first built was erected without interfering with the private roadway. In 1903 the railroad com-

Railway Co. v. Wynkoop.

pany, desiring to improve its road-bed and to put it in a condition for the use of heavier equipment, again negotiated with Wynkoop with reference to placing a stone culvert where the private roadway crossed under the railroad-track. At that time the representative of the railway company suggested the substitution of a stone culvert about ten feet wide, while Wynkoop insisted that the necessities of the farm required an opening fourteen feet wide. There was a suggestion, too, by the railway company that a grade crossing might be made at the end of the embankment, but the parties were unable to agree, and the company proceeded to close up the roadway, when this suit was brought, which resulted in a permanent injunction against the destruction of the undergrade crossing.

It is first contended that as the *situs* of the undergrade crossing is in Doniphan county the district court of Atchison county was without jurisdiction to consider the case; that the provision of section 46 of the civil code (Gen. Stat. 1901, § 4476) requiring that actions "for the recovery of real property or of any estate or interest therein, or for the determination in any form of any such right or interest," must be brought in the county in which the subject of the action is situated applies. This is not an action to recover real property, nor for the determination of an interest therein. It is a suit which operates *in personam*, and its object is to prevent the commission of a wrong by obstructing a roadway. Wynkoop was not asking to have an interest in land determined, nor could any judgment be rendered in the suit which would have that effect. The legal title to the land was in himself, and ever since the right of way for the railroad was condemned and the railroad was built there has been an undergrade crossing from one part of his farm to the other. The proposed closing of this roadway is the wrong of which complaint is made. In establishing the wrong the ownership of the land, as

Railway Co. v. Wynkoop.

well as the condemnation of a right of way over it, was to some extent drawn in question; but these matters were only incidental to the gravamen of the suit—the prevention of a threatened wrong.

Not every action growing out of transactions concerning real property is local. Where the decree sought is to operate on the person, and not upon the real property, the location of the property indirectly affected is not material. It was held in *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891, that a suit to compel the specific performance of an agreement to convey land did not come within the provisions of section 46 of the civil code (Gen. Stat. 1901, § 4476), and that while it related to real estate it could be brought in any county where the defendant might be legally served with personal process. In *Massie v. Watts*, 10 U. S. 148, 3 L. Ed. 181, Chief Justice Marshall, speaking of such a suit, said:

“In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.” (Page 160.)

It is held that jurisdiction of this character is strictly *in personam*, and that the court may exercise it independently of the locality where the act is to be done. The relief sought not being the determination of an interest in real estate but against the defendant personally, suit was rightly brought where personal service could be had. As tending to sustain this view, see: *Alexander v. Tolleston Club*, 110 Ill. 65; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Great Falls Manufacturing Company v. Worster*, 23 N. H. 462; *Clad et al., Appellants, v. Paist*, 181 Pa. St. 148, 37 Atl. 194; *Jennings Bros. & Co., Appellants, v. Beale*, 158 Pa. St. 283, 27 Atl. 948; *O'Connor v. Shannon* (Tex. Civ. App.), 30 S. W. 1096; *Roche v. Marvin et al.*, 92 N. Y. 398; *Rose et al. v. Schoteau*, 11 Ill. 167; *Roys-*

Railway Co. v. Wynkoop.

ton v. Royston, 21 Ga. 161; *McArthur & Griffin v. Matthewson & Butler*, 67 Ga. 134; 11 A. & E. Encycl. of L. 173.

There is a contention that under the evidence Wynkoop was not entitled to an undergrade crossing. In that connection it is argued that the right of Wynkoop to use the crossing is in the nature of an easement, and that it is worthless unless evidenced by writing. The case is not to be treated as an easement obtained by Wynkoop from the railroad company. The private roadway passed over his own land, and he never parted with the right to it or to its use. The company acquired no more than it paid for, and according to the testimony the open passageway was excepted from the right of way, and that fact was taken into account in the allowance of damages by the commissioners. If the right to make a solid embankment had been sought and obtained, an award of damages for the obstruction and the resulting inconvenience of the owner in passing from one part of his farm to the other must have been allowed. The question whether the undergrade crossing was practicable and should be maintained was a proper consideration in the condemnation proceeding. If such a crossing is a part of the plan of the railroad company, and it is considered in awarding damages to the landowner, the company is bound to construct and maintain such crossing. (*K. C. & E. Rld. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *C. K. & W. Rld. Co. v. Cosper*, 42 Kan. 561, 22 Pac. 634; *Railway Co. v. Davenport*, 65 Kan. 206, 69 Pac. 195; 15 Cyc. 717.)

A contract reserving a crossing which diminishes the damages to be paid by the railroad company surely has a binding effect upon such company. The crossing was maintained by the railroad company, and used by the landowner, about seventeen years, without interruption, before this controversy arose; but the right to the crossing does not depend upon inferences based

Mathis v. Strunk.

on the conduct of the parties, nor yet upon the necessity for the crossing, but rests upon an agreement reserving it to the owner, and largely affecting the compensation paid for the right of way. The landowner cannot insist that the opening shall remain in the same form, nor as wide as it was originally left, but under the agreement is entitled to such an undergrade crossing as will meet the ordinary necessities of a farm. The fact that the parties were unable to agree just what should be the width of the crossing did not abrogate the original agreement, nor warrant the closing of the crossing.

There appears to be substantial support in the evidence for the findings of the court, and hence its judgment is affirmed.

All the Justices concurring.

E. MATHIS *et al.* v. S. C. STRUNK.

No. 14,578. (85 Pac. 590.)

SYLLABUS BY THE COURT.

INJUNCTION—*Use of Party Wall—Right to Sue—Title.* Where there is a dispute whether the wall of a building stands wholly upon the land of its owner or rests in part upon that of another, the owner of the building, being in the peaceable possession thereof, may maintain injunction to prevent the adjoining proprietor from using such wall as a party wall until he has established his right thereto in a proceeding brought by him for that purpose.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed May 12, 1906. Affirmed.

W. B. Bailey, and *Adams & Adams*, for plaintiffs in error.

Henry C. Sluss, for defendant in error.

73	595
76	567

The opinion of the court was delivered by

MASON, J.: S. C. Strunk is the owner of lot 103 on Main street in the city of Wichita, and E. Mathis and others are the owners of lot 101, which adjoins it on the south. In 1888 the owner of lot 103 built a three-story brick building thereon, which he and his grantees have ever since occupied. In 1905 the owners of lot 101 asserted a claim that one-half of the south wall of the building stood upon their property and therefore belonged to them. Under color of this claim they were about to erect a building of their own upon lot 101, using for its north wall the south wall of the one already constructed. Strunk brought a suit to enjoin them from doing so, and upon a trial was granted an injunction restraining them from making use of the wall until they should have established their right thereto in a proceeding brought for that purpose. The defendants prosecute error from this judgment.

As the matter has been argued in this court some confusion exists as to the exact legal question involved. The defendant in error contends that, even if his wall stands in part upon the lot of his opponents, he has by adverse possession for more than fifteen years acquired a prescriptive right to the land actually occupied. This contention cannot be sustained, for there is nothing in the pleadings or the evidence to suggest that there was ever any intention on the part of an owner of lot 103 to assert a right to encroach upon lot 101, and the mere physical occupancy of a part of it through mistake as to the situation of the boundary-line could not set the statute of limitation in operation. (*Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138.)

The defendant in error further claims that the district court could not have tried out in this suit the question of the true location of the boundary because upon that matter the parties were entitled to the deci-

sion of a jury. This point seems not to be well taken, for a dispute regarding a boundary does not in a proper sense involve the title to real estate (5 Cyc. 951, 952), and is not of that class of controversies for the determination of which a jury trial may be demanded as a matter of right. (*Swarz v. Ramala*, 63 Kan. 633, 66 Pac. 649.) The vital question in this regard is not whether the court in the injunction suit could have investigated and decided the true position of the boundary-line between the lots, but whether it was obliged to do so at the instance of the defendants. The petition on its face seemed to invite the consideration and settlement of this matter, but in his opening statement the plaintiff made it clear that such was not his purpose but that he invoked the aid of the court to prevent the defendants from interfering with his possession of the building until the line should be ascertained in some other proceeding. The answer contained no prayer for any specific affirmative relief, and was essentially a denial of the averments of the petition. Although it claimed ownership of one-half of the wall, it gave the defendants no standing to insist upon the trial of the title thereto. If the allegations of the petition were sufficient to warrant the judgment rendered, the defendants cannot complain that they also authorized a further inquiry into the disputed facts. If necessary, the petition may be regarded as amended so as to conform to the position taken by the counsel for the plaintiff in the opening statement.

The precise question to be determined, therefore, is whether under the circumstances stated the plaintiff, being in the actual possession of the building, was entitled to the aid of a court of equity to protect that possession until the right of the defendants should be established in an action brought by them. This question must be answered in the affirmative. The plaintiff for the time being was in the peaceful occupancy

of the building, claiming such occupancy to be right-ful. If the defendants desired to challenge that right it was incumbent upon them to assume the burden of instituting some legal proceeding to that end. They could not by forcibly seizing the debatable ground deprive the plaintiff of the advantage his possession gave him and compel him to become the moving party in an action to determine the true boundary of his lot.

The case of *Echelkamp v. Schrader*, 45 Mo. 505, is very similar to the one at bar. There a double house was supposed to stand so as to be bisected by the dividing line between two adjoining tracts of land having different owners, each of whom occupied one-half of the building. It was discovered that the real boundary lay three feet to one side of the middle of the house, and the owner whose holdings were enlarged by this discovery began to tear down the building upon his side up to the dividing line as newly located. The other owner brought a suit to restrain such interference with his occupancy. It was held that he was entitled to such relief to the same extent to which it was granted in the present case. The court said:

"It is usual in cases like this, where the title itself comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence." (Page 509.)

The right of the actual occupant of real estate to enjoin interference with his possession by one claiming title is affirmed under circumstances more or less analogous to those here presented in the following cases: *W. U. Telegraph Co. v. St. J. & W. Ry. Co.*, 3

Nicholson v. Hale.

Fed. 430; *La Chapelle v. Bubb*, 69 Fed. 481; *Pittsburg, S. & W. R. Co. v. Fiske*, 123 Fed. 760, 60 C. C. A. 621; *Jones v. Brandon*, 60 Miss. 556; *Penn. Coal Co. v. Savage*, 1 Lack. Leg. N. 213. The judgment is affirmed.

All the Justices concurring.

SAMUEL NICHOLSON V. D. A. HALE.

No. 14,581. (85 Pac. 592.)

SYLLABUS BY THE COURT.

1. **EJECTMENT**—*Action by a Tax-deed Holder Wrongfully Dispossessed.* Where a tax deed, valid on its face, has been of record for five years, with the tax-title holder in actual possession, and one claiming adversely wrongfully dispossesses him by force, fraud, or stealth, the holder of the tax deed may maintain ejectment to regain what was wrongfully taken from him.
2. ——— *Limitation of Action.* The two-year statute of limitations has no application to such a case.

Error from Cowley district court; CARROLL L. SWARTS, judge. Opinion filed May 12, 1906. Affirmed.

James McDermott, for plaintiff in error.

G. H. Buckman, for defendant in error.

The opinion of the court was delivered by

PORTER, J.: This was an action in ejectment for the possession of a lot in the city of Dexter, Cowley county. In a trial to the court the plaintiff had judgment. The defendant brings error. Each claims title under a different tax deed.

In 1890 the title to the lot was in J. H. Serviss. The taxes for that year were not paid, and in September, 1891, the lot was sold and bid off by Cowley county.

73	599
80	605
73	599
81	755

Nicholson v. Hale.

Ten years later—in June, 1901—the county treasurer assigned the certificate to William Greenwell. He assigned it to the plaintiff in error, and, on March 10, 1902, a tax deed was issued to the latter and recorded on the same day. In December, 1902, plaintiff in error also obtained a quitclaim deed from Serviss, the original owner. He claims to have entered into immediate possession of the premises at the time his tax deed was issued.

The taxes for the year 1891 remaining unpaid, the lot was sold again at the regular sale in September, 1892, and the purchaser assigned his certificate to the National Bond and Debenture Company. A deed was issued to that company October 10, 1895, and recorded on the same day. By subsequent conveyances this tax title passed to the defendant in error, who claims by virtue thereof, and, on July 14, 1903, being then out of possession, he brought this action. By section 7654 of the General Statutes of 1901 it is provided that when lands or town lots are bid off by the county they shall not be sold for taxes levied subsequently until they shall have been redeemed or sold by the county, or the tax certificate assigned by the county. It is conceded that this tax deed was voidable. (*Belz v. Bird*, 31 Kan. 139, 1 Pac. 246; *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 208.) But the defendant in error contends that as it was of record for more than five years, during which time he and his immediate grantors had been in possession of the lot, his title thereto cannot be assailed; that his possession was unlawfully disturbed by the plaintiff in error immediately before he brought this action.

Plaintiff in error contends, first, that the right based upon the statute of limitations is a personal one, and is waived unless expressly pleaded. The only issue was ownership and the right to the possession. Under the pleadings in ejectment provided for by the code it is not necessary for plaintiff to state in his petition

how his title or ownership is derived. (Code, § 595; Gen. Stat. 1901, § 5082.)

The second contention raises a more serious question. The tax deed under which the defendant in error claimed was not void on its face, but merely voidable. With him and his immediate grantors in the actual possession, what was the effect of the five-year statute of limitations? Did it give the defendant in error a right which he could use affirmatively and assert for the purpose of recovering the possession of the premises; or was the right which he thus acquired merely one that he might use as a defense in case his title and ownership should be assailed? It is contended that, having lost possession, he could not use the five-year statute for the purpose of seeking affirmative relief. The cases of *Myers v. Coonradt*, 28 Kan. 211, *Walker v. Boh*, 32 Kan. 354, 4 Pac. 272, *Doyle v. Doyle*, 33 Kan. 721, 7 Pac. 615, and *Stump v. Burnett*, 67 Kan. 589, 73 Pac. 894, are cited and relied upon. In the case last cited the authorities were reviewed, and it was held that notwithstanding the statute a tax deed valid on its face and recorded for five years may be impeached when used as a foundation for affirmative relief in an action brought by the tax-title holder. In that case, however, the land was vacant and unoccupied. The only possession relied upon was constructive possession. This was mentioned as a controlling circumstance. It was there said:

"It is perfectly plain that this is an action to procure something which the plaintiff has never enjoyed. He never had actual possession of the land. He might have taken such possession but he neglected to do so. True, the tax deed, good on its face, cast upon its holder constructive possession, but constructive possession exists only in legal contemplation, and falls far short of the immediate occupation in fact which actual possession requires. The plaintiff therefore seeks to enlarge the scope of his actual proprietorship and add to the sum of enjoyment hitherto furnished by his tax deed the new, distinct increment of actual possession." (Page 591.)

In the case at bar the party setting up the tax deed claimed to have had actual possession of the lot from a few months after the recording of the tax deed in 1895 until dispossessed by the plaintiff in error. There was evidence tending to support this claim, and the general finding of the trial court may be conceded to have settled that contention in favor of the defendant in error.

An exception to the rule that a statute of limitations can only be used as a shield of defense and not as a weapon of attack is recognized where the person claiming under the statute has been wrongfully dispossessed after the prescribed period has run. He may be restored to his rights in an action for possession and base his claims upon the statute. Tiedeman, in section 740 of the second edition of his work on Real Property, says: "But in any case a temporary recovery of possession by the original owner after the running of the statute of limitations will not affect the disseizor's title, where there has been no voluntary surrender to the original owner." To the same effect see *Hinchman v. Whetstone*, 23 Ill. 185; Angell, Lim. § 380.

Where one has held adverse possession of land for the prescribed period, under a claim of title other than a tax deed, his title becomes absolute. He is not required thereafter to continue his possession in order to protect his rights; and while they have been acquired under a statute which in terms only barred the remedy, and made no provision for extinguishing the title of the original owner or casting it upon the adverse claimant, nevertheless that is the net result, and courts will grant him affirmative relief in an action based upon the title thus acquired. (*Leffingwell v. Warren*, 67 U. S. 599, 17 L. Ed. 261; *Faloon et al. v. Simshauser et al.*, 130 Ill. 649, 22 N. E. 835; *Alexander and others v. Pendleton*, 12 U. S. 461, 3 L. Ed. 624; Angell, Lim., 6th ed., § 381.) The title acquired be-

comes as perfect as a title by deed. (1 A. & E. Encycl. of L. 883.)

If there is any reason why this rule should not apply to the title acquired under a tax deed valid on its face, where the five-year statute has run, it must be found in the nature of the thing itself, and because tax deeds are not favored in the law. It has been said that after the five-year statute has run the holder of the tax deed may retain all that he is in possession of by virtue of it, but that he may not use it to obtain something more. (*Walker v. Boh*, 32 Kan. 354, 4 Pac. 272.) In that case the land was vacant and unoccupied, and the action was not in ejectment but one to quiet the title of the tax-deed holder. Here defendant in error seeks to regain something which he had, and was entitled to, and which was wrongfully taken from him. We think that when a tax deed, valid on its face, has been of record for five years, and the tax-title holder is in possession, claiming by virtue of the tax deed, and one claiming adversely wrongfully dispossesses him by force, fraud, or stealth, the holder of the tax title may maintain ejectment to regain what was wrongfully taken from him. He does not thereby seek to enlarge the scope of his original claim or to add to the sum of enjoyment furnished by his tax deed; but his cause of action arises by virtue of the wrongful dispossession, and the courts will permit him to base his claim upon his tax deed and former possession and the wrongful act of the other party. To hold otherwise would encourage reprisals and scrambling for possession, which the law discountenances.

Before the limitation has run the original owner may enter. His entry then is not wrongful, even though made against the will of the person claiming under the tax title. After the limitation has run the owner's right to enter has lapsed. If section 141 of the tax law (Gen. Stat. 1901, § 7680) prevents him after five years from maintaining an action to regain

Phares v. Gleason.

possession from one holding either actual or constructive possession, how can it be said with reason that he can lawfully acquire any rights by a possession obtained by force, fraud or stealth against the person in actual possession? If he can acquire no rights by possession obtained wrongfully, the courts should be open to the one wrongfully dispossessed, and the parties should be restored to their original position.

There is no force in the claim that the two-year statute of limitations barred the action, or that the defendant in error waived any rights by failure to plead the facts relied upon to avoid the statute. As before observed, the petition was in the statutory form, and it was not necessary for the defendant in error to plead any of the facts relied upon to show his title. He claimed that the lot was in the actual possession of himself and his immediate grantors from 1895, shortly after the deed was recorded, until he was wrongfully dispossessed by the plaintiff in error. The judgment of the trial court settled these contentions in his favor. Under these facts the two-year statute has no application. (*Thornburgh v. Cole*, 27 Kan. 490.) The judgment is affirmed.

All the Justices concurring.

WILLIAM PHARES *et al.*, *Minors, etc., et al.*, v.
L. C. GLEASON, as *County Treasurer, etc.*

No. 14,586. (85 Pac. 572.)

SYLLABUS BY THE COURT.

SCHOOL-LANDS—*Forfeiture of Purchaser's Contract—Defective Notice.* To effect a forfeiture of a purchase of school-land strict compliance with the requirements of the statute is necessary. Where the return of the sheriff upon a notice of default in payment fails to show that it was served upon "all persons in possession of the lands" such service is fatally defective, and a forfeiture cannot be predicated thereon.

73 604
74 146

73 604
80 111

Phares v. Gleason.

Error from Trego district court; JAMES H. REEDER, judge. Opinion filed May 12, 1906. Reversed.

Herman Long, for plaintiffs in error.

The opinion of the court was delivered by

GRAVES, J.: This was an application to the district court of Trego county for a writ of mandamus to compel the treasurer of that county to accept the tender of past-due purchase-money on school-lands in that county, made by the plaintiffs herein. The court granted an alternative writ, but after a trial set it aside and refused any relief. The plaintiffs excepted, and bring the case here for review.

The facts, briefly stated, are that Isaac Bowers purchased the land and assigned his certificate to S. S. Phares, who put Martin J. Phares in possession as tenant and removed to Texas with his family, where he died. Default in the payment of principal and interest occurred, and the then county clerk, J. W. Phares, with knowledge that S. S. Phares was dead, issued a notice of forfeiture directed to him, and delivered the same to the sheriff for service. The sheriff made return thereof as follows:

"Received this notice this 19th day of March, 1904, and served the same by delivering a true copy of within notice to Martin J. Phares, who is in possession of said land, and by posting a true copy of said notice in a conspicuous place in the office of the county clerk of Trego county, Kansas, this 26th day of March, 1904, as the within-named S. S. Phares cannot be found in my county; and made return of this notice to the county clerk of county and state aforesaid, this 26th day of March, 1904.

T. D. HINSHAW, *Sheriff*."

The plaintiffs are the heirs of S. S. Phares, and as soon as they heard of the forfeiture proceedings they tendered the amount then due on the land, which was refused.

The plaintiffs had, and still have, the right to pay up all principal and interest on the certificate which

Phares v. Gleason.

may be due, and thereby reinstate the contract of purchase, unless barred by these forfeiture proceedings. It is claimed that service of the notice was insufficient, and the attempted forfeiture therefore void. The forfeiture proceedings are provided for in section 6356 of the General Statutes of 1901, which directs how notices of forfeiture shall be served, using the following language:

"The notice above provided for [which is the notice of forfeiture] shall be served by the sheriff of the county by delivering a copy thereof to such purchaser, if found in the county, also to all persons in possession of such land; and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk."

Statutory forfeiture proceedings must be strictly followed. (*Knott v. Tade*, 58 Kan. 94, 48 Pac. 561; *Furniture Co. v. Spencer*, 59 Kan. 168, 52 Pac. 425; *True v. Brandt*, 72 Kan. 502, 83 Pac. 826.) In this case the return of the sheriff does not show that he served the notice upon all persons in possession of the land, as required by the statute. This omission is fatal to the notice. No forfeiture was effected. The attempt to forfeit the rights of the plaintiffs had no more effect than if it had not occurred.

The judgment of the district court is reversed, with direction to issue a peremptory writ requiring the county clerk to accept the offer of the plaintiffs, and to make such further orders in the case as may be necessary and proper to carry out the views expressed in this opinion.

All the Justices concurring.

F. S. SMITH v. W. W. WHITE *et al.*

No. 14,588. (85 Pac. 588.)

SYLLABUS BY THE COURT.

73 007
279 98

PROMISSORY NOTE—*Joint Makers—Release of One—Effect.* The release by the holder of a promissory note of one or more joint makers does not operate to discharge other joint makers, except as to the full proportional amount which would be payable by those released.

Error from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed May 12, 1906. Reversed.

W. W. Schwinn, for plaintiff in error.

Ready & Ready, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: The plaintiff's cause of action was based on a promissory note, signed by eleven persons, which contained a statement that "this note is subject to a contract." The contract referred to was a guaranty of a stallion, for the purchase-price of which the note was given. The guaranty was pleaded, and full performance alleged. Wallace W. Wicks, one of the signers of the note, pleaded a written agreement between himself and the payee of the note, dated two days after the note, by which the payee agreed that if Wicks desired at any time to be released from the note, and should so notify the payee within eleven months therefrom, that the latter would release the former; that he had expressed such desire within the time, and was entitled to a discharge. This agreement was admitted by the plaintiff, and the action dismissed as to Wicks.

The answer of the other defendants was construed to contain two defenses: First, that the note had been altered after its delivery; and second, that the sale of the horse and the signatures of the defendants to the note had been obtained by the owner of the horse and

Smith v. White.

payee of the note by falsely and fraudulently stating to them that Wallace W. Wicks would become a joint purchaser of the stallion, and would be one of eleven persons to sign a note for the purchase-price thereof, that all of such representations and statements were false, and that they had relied upon them, by reason whereof they were induced to sign the note. Plaintiff's reply denied these statements.

In plaintiff's opening statement he admitted having made the written agreement with Wicks, but denied that it was made prior to its date, which was two days after the date of the note. The cause was submitted to the court upon plaintiff's petition and his oral opening statement. Upon these the court rendered judgment for the defendants.

All facts pleaded as defenses were denied, and there was no evidence offered to sustain any of them. The only fact admitted by the plaintiff was that he had entered into the written agreement to release Wicks, and it must have been concluded by the court that the voluntary release of one maker of a promissory note by the payee will, in law, operate as a release of all makers. The written agreement of release states that it was for a consideration, and if it did not the law would imply a consideration therefor. The plaintiff was only asking judgment against the defendants for the amount due on the note, after deducting the proportion Wicks would have been required to pay. Section 1194 of the General Statutes of 1901 reads:

"Any person jointly or severally liable with others for the payment of any debt or demand may be released from such liability by the creditor, and such release shall not discharge the other debtors or obligors beyond the proper proportion of the debt or demand for which the person released was liable."

Under this statute one joint maker of a promissory note may purchase his release, at any time, for any consideration that the payee is willing to accept, or the payee may voluntarily acquit him of liability without

In re Burnette.

consideration. In either event the remaining makers would not thereby be also released. They could not be held for the proportion owing by the maker thus released. The court could not have found the facts in favor of the defendants without evidence, and they were not entitled to a judgment because the payee of the note had released one of the makers.

The judgment is reversed, and the cause remanded.

All the Justices concurring.

In the Matter of the Disbarment of CLEO D. BURNETTE.

No. 14,589. (85 Pac. 575.)

SYLLABUS BY THE COURT.

1. ATTORNEYS — *Disbarment — Character of the Proceeding.*

Under the statutes of this state the remedy of disbarment is a special proceeding to deprive the accused of the power to abuse the office of attorney and counselor at law. It is not a criminal proceeding, but its gravity suggests caution and strictness. The special statute regulating it must be followed so far as the steps to be taken are prescribed. Otherwise it is to be conducted in general harmony with the practice of the courts in civil cases.

2. SUPREME COURT—*Original Jurisdiction.* Under the constitution of this state the original jurisdiction of the supreme court is confined to proceedings in *quo warranto*, *mandamus*, and *habeas corpus*; and even in these matters some special reason must exist for invoking its powers or parties will be relegated to courts of general jurisdiction for relief.

3. ——— *Appellate Jurisdiction.* Under the constitution of this state the appellate jurisdiction of the supreme court is limited to expounding the law and correcting errors appearing on the record in the proceedings of inferior courts, whether such proceedings be presented for review by proceedings in error or by appeal.

4. ——— *Legislature Cannot Enlarge Scope of Original Jurisdiction.* It is beyond the power of the legislature to enlarge the scope of the original jurisdiction of this court, either

39—73 KAN.

73	609
73	753
73	792
74	687
73	609
176	195
73	609
178	155
78	744

In re Burnette.

directly by authorizing the primary consideration of cases other than those specified in the constitution, or indirectly by including such cases within its review power on appeal.

5. JURISDICTION—*Trial de Novo on Appeal*. The jurisdiction to consider causes *de novo* on appeal, and to decide them on the law and the evidence according to the right of the case, independent of the rulings and judgment of the lower court, is original and not appellate.
6. STATUTORY CONSTRUCTION — *Constitutionality*. If a statute be open to two interpretations, under one of which it would be constitutional and under the other unconstitutional, the court will adopt the meaning consonant with validity.
7. ATTORNEYS — *Disbarment — Appellate Procedure — Statute Construed*. The statute relating to appeals in disbarment cases (Gen. Stat. 1901, § 403) which provides that all the original papers together with a transcript of the docket entries shall be transferred to this court, to be finally considered and acted upon, being ambiguous, is held not to authorize a trial *de novo* but to create a special method for bringing such causes to this court for consideration according to its constitutional appellate jurisdiction.
8. ——— *Cause Remanded for Trial—Refiling of Accusation*. After a judgment of this court in a disbarment appeal remanding the cause to the district court for trial, it is not essential to jurisdiction that the accusation be refiled in the district court.
9. ——— *Omission Specifically to Order Accusation Transferred — Jurisdiction*. In such a case the omission of this court to make a specific order relating to the transfer of the accusation to the district court and its custody pending the proceedings there does not deprive the district court of jurisdiction, and if the accusation actually be present there, and accessible to the court and to the accused during the trial, he sustains no injury of which he can complain.
10. EVIDENCE — *Attorney and Client — Privileged Communication—Publication*. After a party to a cause has voluntarily solicited and procured the reading of his unfiled pleading by a non-professional stranger, has published its contents in a newspaper interview, and has spread the substance of it upon the record of a court of general jurisdiction in a pleading filed against the attorney who assisted in preparing it, the privileged character of the document is waived; it then becomes common public property; the attorney is released from the confidential relation he bore to it before its publi-

In re Burnette.

cation, and his production of a copy of it for use as evidence in a subsequent proceeding brought against the party is not a breach of privilege.

11. ——— *Disbarment Proceeding — Failure of Accused to Testify.* The failure of the accused in a disbarment proceeding to give testimony either in denial or explanation of incriminating facts may be considered by the court in weighing the evidence of his guilt.

Appeal from Sumner district court; PRESTON B. GILLET, judge *pro tem.* Opinion filed May 12, 1906. Affirmed.

Hackney & Lafferty, James Lawrence, and Waggener, Doster & Orr, for the accused.

J. A. Burnette, W. W. Schwinn, and J. S. Dey, prosecuting committee.

The opinion of the court was delivered by

BURCH, J.: On September 2, 1903, the district court of Sumner county rendered a judgment revoking the license of Cleo D. Burnette to practice as an attorney and counselor at law. From that judgment an appeal was taken to this court, under the provisions of section 403 of the General Statutes of 1901, which reads as follows:

“In case of a removal or suspension being ordered by a district court, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the docket entries, shall thereupon be transferred to the supreme court, to be there considered and finally acted upon. A judgment of acquittal in the district court is final.”

When the appeal was heard it was argued that the judgment was erroneous because the accusation had been verified upon information and belief only, and because, after appellant had failed to answer, the court, acting under section 402 of the General Statutes of 1901, rendered such judgment as the case required without hearing evidence. Upon consultation, it was

In re Burnette.

understood that a majority of the court believed that the judgment should be reversed because it had been rendered without evidence in support of the accusation. A minority also thought the accusation to be insufficiently verified. Therefore an order was made remanding the cause to the district court, with instructions to set aside its judgment and to proceed with a hearing upon the accusation. Various members of the court expressed their views, from which it appears that, while the order of reversal was agreed to by a majority, neither ground of reversal was sustained, and the judgment of the district court should have been affirmed. (*In re Burnette*, 70 Kan. 229, 78 Pac. 440.) This fact was not noted until the order of reversal had gone into effect.

Upon the return of the cause to the district court a trial was had, and a judgment of disbarment was again entered, from which the present appeal was taken. The accused now claims this court had no power to remand the cause; that the appeal is for the purpose of a hearing *de novo*; that the object of filing all original papers and a transcript of the docket entries in this court is that a trial *de novo* may be had; that when the original papers are transferred to this court they are to be considered independently of the judgment of the district court, and that a final judgment must be rendered upon them here.

In this state remedies in courts of justice are divided into two classes—actions and special proceedings. An action is an ordinary proceeding by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. There are two kinds of actions—civil and criminal. A criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof. Every other action is a civil action. Every remedy other than an action is a special proceeding. (Gen. Stat. 1901, §§ 4431-4436.)

A disbarment proceeding is not prosecuted by the state as a party. Many causes for disbarment are not denounced as crimes at all. Acts amounting to offenses under the crimes act which constitute causes for disbarment are such only because they disclose a disqualification to exercise the rights, privileges and powers of an attorney and counselor at law. Proceedings to disbar an attorney on account of criminal conduct connected with the practice of his profession are wholly independent of any prosecution for crime. The proceeding to disbar is not for the punishment of the derelict attorney, but for the protection of the courts, the legal profession, and the administration of justice generally. The purpose is not to enforce a forfeiture against the accused in the sense of an amercement, or to visit any kind of retribution upon him, but to deprive him of the power and opportunity to abuse an office. In all free governments crimes must be defined by the legislative power so that nothing is left to the courts but to interpret and administer its will. But every court has the right to purge its roll of persons guilty of misconduct, whether the acts done have been proscribed in advance or not.

It is true, as stated in *Peyton's Appeal*, 12 Kan. 398, that the public is benefited by the disbarment of a disreputable lawyer, that it involves him in disgrace, and that it takes away from him the means of gaining a livelihood. The gravity of the matter suggests caution and strictness. But it contravenes the express classification of the statute, is destructive of scientific accuracy, and leads to confusion, to call the proceeding criminal. This confusion is nowise clarified by using the hybrid expression "*quasi-criminal*." It involves an ancient fallacy to give a thing a name and then attempt to prove its attributes by that name. The learned judge who presided at the last trial was no doubt misled by the sometime description of the proceeding as criminal. He excluded important deposi-

tions taken against the appellant, holding that the accused had the right to meet the witnesses face to face. Such is not the law (4 Cyc. 915), and the circumstance illustrates the great danger lurking in the unnecessary employment of unauthorized terms. It is sufficient to say with the legislature that the remedy of disbarment is a special proceeding. The special statute regulating the matter must be observed so far as the steps to be taken have been prescribed. Otherwise the proceeding must be conducted in general harmony with the practice of the courts in civil matters. Thus, notwithstanding the statute requires the evidence to be reduced to writing, filed and preserved, and all original papers, together with a transcript of the docket entries, to be filed in this court upon appeal, testimony not incorporated in a bill of exceptions or case-made allowed and settled by the judge will not be considered here. (*In re Norris*, 60 Kan. 649, 57 Pac. 528.)

In this state, except in certain specified matters, the supreme court is a court of error and review. In criminal cases it may reverse, affirm or modify the judgment appealed from, or may order a new trial. In civil cases it may affirm, reverse, vacate, or modify, grant new trials, and, if the facts be found or agreed to, may designate the character of judgment to be entered. But in all appellate cases the supreme court considers the conduct of the lower court. Error must be assigned as inhering in the rulings, orders and judgments appealed from. The supreme court decides the questions thus presented as they arise upon the record, and issues its mandate to the tribunal from which the appeal was taken to carry the judgment rendered into execution. Such being the general character of appellate procedure in this state, a trial *de novo* here would be an anomaly, and can take place only under the compulsion of some sovereign command. Elsewhere it is held that trials *de novo* can be had in appellate courts only by virtue of express authority, and

In re Burnette.

statutes to that effect are to be strictly construed. (3 Cyc. 260.)

It is doubtful if the disbarment statute of this state is of the peremptory kind required. The use of the word "appeal" does not alone import a trial *de novo*. The old civil-law signification no longer obtains, and the term not merely includes but is commonly used to designate a review of the proceedings of an inferior court brought up as by writ of error. (*Styles v. Tyler*, 64 Conn. 432, 458, 30 Atl. 165; *Dutcher v. Culver*, 23 Minn. 415, 420; *Lyles v. Barnes*, 40 Miss. 608, opinion; *The State of Florida, ex rel., v. King*, 20 Fla. 399; *In re Jessup*, 81 Cal. 408, 465, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.) That the appellate jurisdiction of this court under the constitution includes proceedings in error no one will deny. The limitation of final consideration and action to original papers (which do not include evidence; *In re Norris*, 60 Kan. 649, 57 Pac. 528), and a transcript of the docket entries, might be taken to indicate that the facts are not to be reinvestigated at all rather than that they shall be tried anew; and the entire statute lacks the certainty and the mandatory quality necessary to engraft this alien practice upon our appellate procedure.

Appellant cites the case of *State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, in support of his contention. The Iowa statute relating to appeals in disbarment cases reads like our own, and in the opinion it was said that under the section relating to the revocation of the license of an attorney, and providing that all the original papers, with a transcript of the record, shall be transferred to the supreme court on appeal, to be there considered, the supreme court is to consider the case *de novo*. Contrary to the law of Kansas, the practice of trying certain cases *de novo* in the supreme court is an established feature of the judicial system of Iowa. In the opinion cited the question at issue is not discussed at all, and the decision was rested upon the case

In re Burnette.

of *In re Crum*, 7 N. Dak. 316, 75 N. W. 257, which was disposed of under a statute obliging the supreme court to try and determine disbarment appeals as the law and the evidence might warrant. Therefore *State v. Mosher* is not of controlling authority. The statute under consideration being ambiguous, it must be interpreted in a manner to uphold it if possible. If it were given the meaning recognized by the Iowa court it would be unconstitutional, and therefore void.

The jurisdiction to consider and decide causes *de novo* is in its essence original. The manner in which a case reaches the higher court is not the test. Jurisdiction being the power to hear and determine, the nature of the functions to be exercised controls, whether they are brought into activity by primary process or by removal from an inferior tribunal. Upon a trial *de novo* the power of an appellate court in dealing with the pleadings and the evidence, in the application of the law, and in the rendition of judgment according to the right of the case, all independent of the action of the lower court, is no different from what it would be if the case were begun there originally, and hence is not appellate within the meaning of laws creating jurisdiction. (*Lacy v. Williams*, 27 Mo. 280; *County of St. Louis v. Sparks*, 11 Mo. 201; *Ex Parte Henderson*, 6 Fla. 279; *The State, ex rel., v. Vann*, 19 Fla. 29.)

The constitution of this state provides:

"The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law. . . .

"The supreme court shall have original jurisdiction in proceedings in *quo warranto*, *mandamus*, and *habeas corpus*; and such appellate jurisdiction as may be provided by law." (Const. art. 3, §§ 1, 3; Gen. Stat. 1901, §§ 148, 150.)

The distinction between original and appellate jurisdiction is here clearly drawn. The supreme court, as

the head of the judicial system, was not made the forum for general litigation. The protection and enforcement of rights, the prevention and redress of injuries and the punishment of crimes are committed to district and inferior courts of general jurisdiction, where all ordinary actions are to be initiated and determined. A few matters of great public importance and certain depredations upon personal liberty are cognizable in the first instance by the supreme court, through proceedings in *quo warranto*, *mandamus*, and *habeas corpus*. But even in such cases some special reason must exist for invoking its powers or parties will be relegated to a court of general jurisdiction for relief. (*The State, ex rel., v. Breese*, 15 Kan. 123; *Evans v. Thomas*, 32 Kan. 469, 476, 4 Pac. 833; *Supreme Lodge v. Carey*, 57 Kan. 655, 47 Pac. 621; *The People v. City of Chicago*, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833; *The People v. Board of Trade*, 193 Ill. 577, 62 N. E. 196; and cases cited in these opinions.)

It would be entirely impossible for a single supreme court to hear and decide controversies generally, arising within the state, upon their merits; and if any considerable number of them were to be heard anew little opportunity would remain for the performance of the true functions of an appellate court. Therefore the constitution establishes a classification of its own, and in all except the extraordinary matters referred to the power of the supreme court is limited to expounding the law and supervising the conduct of inferior tribunals by correcting errors in the decisions which they may promulgate.

It is beyond the power of the legislature to enlarge the scope of the original jurisdiction to which this court is confined, either directly by authorizing the primary consideration of causes other than those specified in the constitution, or indirectly by including such cases within its review power on appeal.

"This court is created by the constitution, and the outlines of its jurisdiction established by that instru-

ment. It has original jurisdiction in three specific classes of cases, which it possesses independent of any legislation, and such appellate jurisdiction as may be provided by law. The jurisdiction of the court under this last provision is wholly dependent upon the will of the legislature. It may be enlarged or restricted, as the legislature shall prescribe; but in all its acts the legislature is still under the restriction that the jurisdiction conferred must be appellate, not original." (*Auditor of State v. A. T. & S. F. Railroad Co.*, 6 Kan. 500, 504, 7 Am. Rep. 575. See, also, *The State, ex rel., v. Wilson*, 30 Kan. 661, 2 Pac. 828.)

In the case of *Klein v. Valerius and another*, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609, it was held that since the jurisdiction of the supreme court of Wisconsin under the constitution of that state was appellate only, except in specified cases, a statute attempting to make it the duty of the court to examine and review the evidence preserved by a bill of exceptions, and give judgment according to the right of the case, regardless of the decision by the court below upon questions of fact as well as of law, was unconstitutional and void. The opinion reads:

"It is suggested, however, that the recent amendment to section 3070, Revised Statutes, by section 2, chapter 242, Laws of 1893, makes it the 'duty' of this court to review 'all questions of law or fact presented by the record upon such appeal or writ of error,' and 'to examine and review the evidence when the same is preserved by a bill of exceptions, and give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below, according to law and equity.' . . . Undoubtedly, within certain limits, the legislature has power to regulate the practice of this court; but it must be remembered that this court, as well as the legislature, gets its judicial power and jurisdiction directly from the constitution. That instrument declares that 'the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace.' (Sec. 2, art. 7.) It moreover declares that 'the supreme court, except in cases otherwise pro-

In re Burnette.

vided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed.' (Sec. 3, art. 7.) The case at bar is not one of those otherwise provided for in the constitution, and hence is not within the exception mentioned. . . . It may be added that much less can the legislature take anything from the original jurisdiction of the circuit courts and give the same to this court in cases in which it has only appellate jurisdiction. We must hold that, in so far as section 2, chapter 242, Laws of 1893, has attempted to give this court original jurisdiction in cases in which, under the constitution, it only has appellate jurisdiction, the same is null and void." (Pages 59, 60, 62.)

In Florida the constitution conferred jurisdiction in civil actions at law upon justices of the peace, if the amount or value involved should not exceed \$100. It also gave the circuit court original jurisdiction if the amount or value in controversy should exceed \$100, and final appellate jurisdiction in cases coming from justices' courts in which the amount or value should be twenty-five dollars or upward. The legislature passed an act providing that when an appeal should be perfected the justice should transmit to the clerk of the circuit court a certified copy of all the entries in his docket and all papers filed in the case, and providing that "thereupon the said appellate court shall proceed to hear the said cause, and may allow such amendments therein as may be just, and render such judgment as may be conformable to law and the justice of the case. The trial shall be by jury, if demanded by either party." A subsequent statute provided that "all appeals taken from a judgment of any justice of the peace shall be tried *de novo*." The supreme court held these acts to be unconstitutional, as attempting to confer original jurisdiction on the circuit court, saving them, however, to the extent that they provided a method of bringing up cases for review on error ac-

In re Burnette.

cording to the proper appellate jurisdiction of the circuit court. In the opinion it was said:

“Appellate pertains to the judicial review of adjudications. Appellate jurisdiction is the power to take cognizance of and review proceedings had in an inferior court, irrespective of the manner in which they are brought up, whether by appeal, or by writ of error.”

. . . . The case of *Ex parte Henderson*, in 6 Fla. 279, decided that the trial *de novo* of a cause coming to the circuit court on appeal from a justice’s court was the exercise of original rather than appellate jurisdiction.

. . . . Where words confer only appellate jurisdiction, original is clearly not given. (*Ex parte Henderson*.) And especially where the constitution draws the line distinctly, and clearly declares where the boundary is, it is beyond the power of the legislature to establish a different one.

“The constitution confers on circuit courts appellate jurisdiction, and it is confined to the limits there defined. Whether exercised by a writ of error, *certiorari*, or appeal, as may be provided by statute, it is still appellate, and its office is to review the proceedings of the inferior tribunal and to decide the law of the case as presented by the record legitimately brought up by the appeal.

“The constitution conferring on parties the right of appeal, and on the circuit courts the power to entertain it, the statute has provided *how* an appeal may be taken. While it is evident that the legislature had in view a trial by the exercise of original jurisdiction of the cause appealed, yet so far as it provided the machinery by which the appeal might be effected the law is valid to give the circuit court power to dispose of the case; while so much of the law as provided for a trial by a jury, or otherwise than by a review, is not authorized but conflicts with the constitutional restriction. The appeal here provided operates as a statutory writ of error, bringing up the proceedings for examination and judgment upon their validity. *Hendricks v. Johnson*, 6 Porter, 472; *Lewis v. Nuckolls*, 26 Mo. 278; *Lyles v. Barnes*, 40 Miss. 608.” (*The State, ex rel., v. Baker*, 19 Fla. 19, 26.)

The constitution of the state of Connecticut provides as follows:

“The judicial power of the state shall be vested in

In re Burnette.

a supreme court of errors, a superior court, and such inferior courts as the general assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law." (Art. 5, § 1.)

In 1893 the legislature of that state passed an act in the following terms:

"SEC. 7. Either party may appeal, from any finding or refusal to find any fact, to the supreme court of errors in the manner now by law provided."

"SEC. 9. The supreme court shall review all questions of fact raised by the appeal as well as all questions of law, and in all cases where no evidence has been improperly admitted or excluded in the trial court shall determine the questions of fact and law and render final judgment thereon. In passing upon said questions of fact said supreme court shall not reverse the finding of the trial court upon any question of fact, unless it find the conclusions of such trial court upon such question clearly against the weight of evidence.

"SEC. 10. The rights of appeal under this act shall be in addition to those now provided by law, and the provisions of this act shall apply to all suits now pending." (Pub. Acts Conn. 1893, ch. 174.)

From the use of the name "supreme court of errors," and from a consideration of the history of the judicial establishments of the state prior to the adoption of the constitution, in 1818, the court, in *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165, came to the following conclusions respecting its powers:

"The most significant feature in the establishment of the court is found in the fact that it was the deliberate adoption into our system of judicature of the fundamental principle, which has ever since characterized it, that the certainty of our jurisprudence as well as the security of parties litigant depends upon confining the jurisdiction of a court of last resort to the settlement of rules of law. . . . Two courts are established and the character of their jurisdiction described by the constitution itself; one with a supreme jurisdiction in the trial of causes, and one with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes.

In re Burnette.

The 'superior court' is a 'superior court of judicature over this state,' with a supreme jurisdiction original and appellate over the trial of all causes not committed to the jurisdiction of inferior courts. The 'supreme court of errors' is not a supreme court for all purposes, but a supreme court only for the correction of errors in law. . . . The judicial power committed to the court was intended to secure the people against a mixed jurisdiction they deemed unwise and unsafe." (Pages 447, 450, 453.)

Consequently it was held that the act quoted did not authorize the court to determine, from evidence spread upon the record brought up by appeal, questions of pure fact settled by the trial court. The syllabus of the case reads:

"The supreme court of errors, as established by the constitution of this state, is a court of last resort for the correction of errors, and its jurisdiction as described in the constitution relates to the determination of principles of law and not to the trial or retrial of pure questions of fact.

"In view of such jurisdiction, chapter 174 of the Public Acts of 1893 cannot be construed as requiring this court to determine, upon evidence spread upon the record, questions of pure fact settled by the judgment of the trial court." (*Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.)

In the case of *Jasper v. Hazen*, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58, it was said:

"Under section 25, chapter 120, Laws of 1891, this court is required, upon appeal, to review questions of fact in cases tried by the court or referee, when exceptions to the findings are duly taken and returned. But this court will not try the case *de novo*. The findings below are presumed to be correct. Appellant must show error, and a finding based upon parol evidence will not be disturbed unless the error be made clearly to appear." (Syllabus.)

This doctrine is approved. The less-pronounced views announced in the case of *Christianson v. Warehouse Association*, 5 N. Dak. 438, 67 N. W. 300, 32 L. R. A. 730, are not in harmony with the principles

In re Burnette.

which lie at the foundation of the judicial system of this state. The decisions quoted are entirely sound, and are conclusive against the appellant's contention.

In the case of *Marbury v. Madison*, 5 U. S. 137 (reprint, vols. 5-6, p. 49), 2 L. Ed. 60, involving the power of congress to authorize the supreme court of the United States to issue the writ of mandamus, Chief Justice Marshall said:

"The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.' . . . The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

"In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

"It has been insisted at the bar that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause assigning original jurisdiction to the supreme court contains no negative or restrictive words, the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

"If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere

surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance. . . . When an instrument organizing fundamentally a judicial system divides it into one supreme and so many inferior courts as the legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

"To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

"It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

"The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution." (Reprint, vols. 5-6, pp. 66-68.)

In re Burnette.

The statute in question does no more than to provide in part a special method for bringing disbarment cases to this court for consideration according to its constitutional jurisdiction, which includes nothing except a revision of errors appearing upon the record and power to enforce the decision rendered. Therefore, the judgment upon the first appeal remanding the cause was valid, and invested the district court with authority to proceed as directed.

At the second trial appellant objected to the jurisdiction of the district court, and after conviction moved an arrest of judgment, because the accusation had been transmitted to this court on appeal, and was not then technically on file in the district court. It is true that this court made no special order relating to the transfer of the original papers to the district court and their custody pending the proceedings there. But this fact did not deprive the district court of jurisdiction. When the cause was remanded the district court had the same jurisdiction it originally possessed, and the absence of the accusation from its files could not terminate its authority. The accusation having once been filed in the district court, no useful purpose could be subserved by refileing it. The reason for requiring papers to be filed is to preserve their identity, and to afford them the protection secured to court records. So long as the accusation was in official custody this purpose was accomplished. It is true that the original papers ought to be present in the district court during the trial, in order that the court and the parties may be able to conduct and verify each step of the proceeding by them. The record indisputably shows that the original papers in this case not only were present in the district court at the trial, but that counsel for appellant used the accusation in the cross-examination of a witness, and introduced another original paper in evidence. What danger to the appellant would have been circumvented if the accusation had been refiled,

In re Burnette.

or what embarrassment he suffered because it was not, he forbears to disclose. The circumstance afforded no ground whatever for assailing the jurisdiction of the district court. It did serve the appellant, however, as a flimsy pretext for not answering the accusation, and for refusing to give testimony regarding the nefarious transaction disclosed by the evidence adduced by the prosecuting committee.

The legal sufficiency of the evidence to support the findings of the trial court is challenged. The charge against Burnette, briefly stated, is that he manufactured a spurious letter to be used as evidence on the trial of a civil action in the district court of Sumner county, and at such trial, as a witness, falsely swore to the genuineness of the letter. On July 21, 1902, May Randolph brought a suit in the district court of Sumner county against Eli McCaulley and others for the specific performance of a contract for the sale of land. It was necessary to make out the alleged contract from letters written by Burnette to McCaulley and answers thereto by McCaulley to Burnette. On May 30, 1902, Burnette reported a sale, and among other things said:

"I started to make out a deed for the place but discovered that I did not know the names of all the parties who should sign the deed; consequently I have made out a list of the heirs as best I could and herewith enclose them on a separate sheet. I wish you would examine the names of these parties on this separate sheet and those that I have not completed I wish you would complete if you can and return them to me."

On June 4 Burnette wrote again:

"Please send me list of heirs, stating whether they are married or single, and if married give the names of their husband or wife, as the case may be, so that I can make out deed at once. I sent you a statement in my last letter of this kind for you to fill out, but it seems that you overlooked it. Deed cannot be made until I have the names of the parties who are going to give the deed."

In re Burnette.

Other letters passed between the parties. Mr. Ed. T. Hackney represented Randolph, and copies of the letters Burnette had written to McCaulley, made from Burnette's letter-press copies, were given to him. The original letters McCaulley had written were also given to him. Mr. Ivan D. Rogers represented McCaulley, and received from his client the letters Burnette had written.

Preparatory to the trial the attorneys for the respective parties agreed that the correspondence might be introduced without preliminary proof. To avoid mistake Hackney and Rogers checked over the correspondence, and Rogers was not informed of any letter of May 31, 1902. Shortly before the trial Rogers went to Burnette's office and told him he wanted to be sure he had all of Burnette's letters to McCaulley, and asked him to get his letter-book, so the fact could be determined, as he wanted to be sure. Burnette took his letter-book, Rogers held his letters, and the two went through them to ascertain the fact, and no copy of any letter of May 31, 1902, was pointed out to Mr. Rogers. When the trial occurred, on May 29, 1903, a purported copy of a letter from Burnette to McCaulley, dated May 31, 1902, containing important matter bearing upon the rights of the parties, was offered in behalf of the plaintiff. Objection was made because no such letter had ever been heard of by the defendant's counsel prior to that time. Burnette was sworn as a witness and testified that he had corresponded with McCaulley; that his stenographer kept copies of his letters to McCaulley; that the letters in a letter-book produced were copied in the order in which they were written; that he wrote a letter of May 31, 1902, corresponding to a copy contained in the book; that he kept a copy of that letter; that the copy in the book was correct; and that the letter was mailed to McCaulley. He further stated that in making copies of letters for Mr. Hackney he

In re Burnette.

made copies of the letters relating to the sale as shown by the letter-press book. The court prudently adjourned the case to a later date.

On August 6, 1903, when the trial of Randolph against McCaulley was resumed, Burnette declined to testify, on the ground that his testimony might incriminate him. He did testify, however, that he dictated the letter of May 31, 1902, to his stenographer, Miss Barnes. He was not pressed to state when or under what circumstances the dictation occurred.

On August 6, 1903, the accusation involved in this proceeding was prepared and verified, and on the next day it was presented to the court. On September 2, 1903, the first judgment in disbarment was rendered. On September 4 an application was made to set aside the judgment, and the court made an order that if before September 8 an answer should be filed containing a defense to the accusation the judgment would on that day be set aside. On September 4 Burnette subscribed and swore to an answer to the accusation before a notary public, which answer gave a detailed account of the writing of the spurious letter in his office and the making of the copy of it in his letter-book some time in the month of August, 1902. These acts, however, although committed in his presence, were attributed to another person. Various conversations with the party charged to be the actual writer, relating to the transaction, were narrated, and the following admission was made:

"That some time afterward, along in the first days of September, 1902, this respondent made a lead-pencil copy of said letter on a piece of typewriting paper and dictated the same from said copy to said Morah Barnes, who was at that time a stenographer in the office of Elliott & Burnette; that this respondent shortly afterward told said Morah Barnes that she need not write said letter and she could tear it up or scratch it out. The dictation of said letter to said Morah Barnes was done at the request and the suggestion of ——— [the person charged with writing the letter] and so said

In re Burnette.

Morah Barnes could get and would be under the impression, and of the opinion, that she had written such a letter in which the name of Randolph was mentioned."

The answer concluded with the statement that while on the witness-stand in the trial of Randolph against McCaulley the accused did not intend to say he wrote or dictated the letter of May 31, 1902, or that he copied it in his letter-book. When Burnette presented himself before the notary to be sworn to this document he asked the officer to read it, which he did. The paper was discussed between them, and the notary hesitated to have any relation to it because it implicated other persons and he feared it would cause trouble. On the same day Burnette gave an interview to Mr. H. L. Woods, editor of the *Wellington Daily News*, containing the same facts which were embodied in the answer, but somewhat more in detail. A portion of the interview reads as follows:

"'On one of these occasions ——— said that he would write and copy the letter and he and Randolph would take the witness-stand when the suit came up and swear that they knew the letter was written before the suit was filed because they saw it. I finally yielded, and ——— sat down to write the letter on our typewriter.' . . . 'Who changed the figures in the index in the letter-book?' Burnette was asked. 'Those changes I made. I think it was along in February or March this year. I had given Miss Barnes orders to make copies of all the McCaulley letters, and when this letter was not copied I thought it would be well to change the indexing so that the letter would show. The figures are mine and I scratched the others out.'"

The interview was printed in the evening issue of the paper named. On the evening of September 5 Burnette left the state, after making an effort to conceal the fact that he was going, and did not return until March 4, 1904. On his return he published the contents of his answer in the disbarment proceedings (which, however, had never been filed) in the petition

filed against Mr. C. E. Elliott, which was considered by this court in the case of *Elliott v. Burnette*, 72 Kan. 624, 84 Pac. 374. In this petition he denied the truth of the facts he had sworn to in the answer, and asseverated the genuineness of the letter of May 31, 1902.

Meanwhile Mr. Woods had been arrested for libel, by the party implicated by Burnette, on account of the publication of Burnette's interview. On the trial of the libel case Burnette was a witness. He admitted the conversation with Woods on the morning of September 4, 1903, examined a copy of the *Wellington Daily News* of that date, and stated that it contained the substance of such conversation, but declined to say whether the matter was true because it might incriminate him. He did, however, make the following further significant admissions:

"Ques. Do you refuse to testify on the ground that your testimony in regard to the statement made to Mr. Woods would tend to incriminate you because of your testimony on the trial of Randolph against McCaulley? Ans. I do. I think it might; yes, sir. Let me see that paper. ("Exhibit C" handed to witness.) I think I can testify to parts of that article, except to the part that has to do with the writing or copying and the mailing of the letter.

"Q. Was there a conversation between you and _____ in regard to writing a letter to Eli McCaulley and dating it back at any time after the suit of Randolph against McCaulley had been brought? A. There was.

"Q. Where did that conversation take place? A. Took place in our office.

"Q. Office of Elliott & Burnette? A. Yes, sir.

"Q. Was Mr. Elliott there? A. No, sir.

"Q. Was Morah Barnes there? A. No, sir."

"Q. Did you and _____ have any conversation in regard to the letter, or copy of the letter, dated May 31, 1902, purporting to have been addressed to Eli McCaulley and written by you, after the 29th of May, 1903, and prior to the 6th day of August, 1903? A. Did we have any conversations?

"Q. Yes, sir. A. Yes, sir.

"Q. How many conversations did you have? A.

Well, of course, I would n't undertake to say how many, but then there were fifteen or twenty, I should judge, at different times between those dates."

It is of course plain to every lawyer that there could be no occasion for talking about writing a post-dated letter if the letter of May 31, 1902, were genuine. A genuine letter would not have aroused the feverish agitation which led to fifteen or twenty consultations about it. If the letter had been genuine a copy of it would have been given to Hackney, who would have shown it to Rogers when they were checking up the correspondence; and Burnette would have called attention to its absence when Rogers was checking up the correspondence to be sure he had it all. Not being genuine it was necessary to conceal it from Rogers until the trial; else Rogers would have had time to interrogate his client, a non-resident of the state, and the scheme would have failed or would have been exposed. Burnette's letter to McCaulley of May 30 contained the list of heirs. His letter of June 4 referred to that letter as the last, and left no room for one of May 31.

These facts are all inconsistent with the genuineness of the disputed letter. They are consistent with the interview with Woods, and with the disbarment answer. The statements in the petition against Elliott were probably inserted in a floundering attempt on the part of Burnette to rehabilitate himself after he had absconded and returned. Whether Burnette fabricated the letter alone, or had a confederate, is immaterial. The court was abundantly justified in finding the accused guilty, and its conclusion is fortified by the failure of Burnette to interpose in court any single written or oral statement, either in denial or explanation of the facts charged against him, from the day the accusation was filed to the present time. (*Matter of Randel*, 158 N. Y. 216, 52 N. E. 1106; *In re Wellcome*, 23 Mont. 450, 468, 59 Pac. 445; *Ex parte Thompson*, 32

Ore. 499, 52 Pac. 570, 40 L. R. A. 194; *The People v. Webster*, 28 Colo. 223, 225, 64 Pac. 207.)

Some objections to the admission of evidence are argued. The disbarment answer was proved, after the original had been traced into Burnette's possession, by a copy taken by one of his attorneys, who furnished it to the prosecuting committee. It is claimed the paper was privileged. As already shown, Burnette published the matter contained in this answer to the notary who administered the oath to him. He published the same matter to Woods. He again published it in his petition against Elliott. It was then no longer private or confidential or privileged. Whenever a party to a cause voluntarily solicits and procures the reading of his unfiled pleading by a non-professional stranger, bruits it in a newspaper interview, and blazons it upon the records of a court of general jurisdiction in another pleading filed against the attorney who assisted in preparing it, the privileged character of the document is waived; it then becomes common public property; the attorney is released from the confidential relation he bore to it prior to its publication, and his production of a copy of it which he has retained, for use as evidence in a subsequent proceeding brought against the party, is not a breach of privilege. (*In re Elliott*, ante, p. 151.) If any decided cases have attempted to make the rule of privilege a byword by holding to the contrary, they are disapproved.

The newspaper interview with Woods was proved by an identified copy of the *Wellington Daily News* of September 4, 1904. It having been shown that on the trial of the libel suit, after inspecting that issue of the paper, Burnette declared he made the statements it contained, the paper was the best evidence. This interview constituted an admission that the letter of May 31, 1902, was not genuine, and the fact that on the trial of the libel case Burnette declined to answer respecting its truth did not affect its admissibility.

The judgment of the district court of Sumner county revoking the license of Cleo D. Burnette to practice as an attorney and counselor at law in the courts of Kansas is affirmed.

All the Justices concurring.

TIMOTHY FORAN V. JOSEPH HEALY.

No. 14,594. (85 Pac. 751.)

SYLLABUS BY THE COURT.

1. **INSANE PERSONS—Appointment of a Guardian—Jurisdiction.** Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence.
2. ——— **Inquiry as to Mental Condition—Limitation of Jurisdiction.** The jurisdiction conferred upon other probate courts by section 3941 of the General Statutes of 1901 to inquire into and adjudicate upon the sanity of persons in the county is intended as a police regulation, and jurisdiction ends with the adjudication and commitment or discharge of such person.
3. ——— **Conclusiveness of Adjudication of Mental Incapacity.** An adjudication of lunacy under section 3941 of the General Statutes of 1901, legally had, is conclusive upon the lunatic and all other persons; and the probate court of the county where such lunatic has a permanent residence may accept and act thereon the same as if such adjudication had occurred in that court.
4. ——— **Foreclosure of a Mortgage on Lunatic's Property—Service upon the Guardian.** Where a guardian has been appointed by the probate court of the proper county, as above stated, and a suit to foreclose a mortgage upon the real estate owned by the lunatic for whose estate such guardian was appointed is commenced in the district court of such county, service of summons upon such guardian will confer jurisdiction upon the district court to adjudicate the rights of such lunatic in the real estate.
5. ——— **Redemption of Property after Restoration to Sanity.** A lunatic whose property has been sold under foreclosure proceedings wherein his guardian was served with summons,

Foran v. Healy.

as above stated, has no right to redeem the property from such sale after his restoration to sanity merely for the reason that the court did not acquire jurisdiction by service of summons on such guardian.

Error from Lincoln district court; **ROLLIN R. REES**, judge. Opinion filed May 12, 1906. Reversed. Opinion denying a rehearing filed July 6, 1906.

Z. C. Millikin, and *George D. Abel*, for plaintiff in error.

Garver & Larimer, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: This is a suit to redeem real estate from what is claimed to have been void foreclosure proceedings. The defendant in error owned the real estate, which is located in Lincoln county, Kansas, where he resided with his family. He became insane some time before March 3, 1897, and wandered away from his home. Soon afterward he appeared at the governor's office in Topeka, armed with two revolvers, and demanded of that official the redress of some imaginary wrong. He was arrested and tried for insanity in the probate court of Shawnee county, adjudged a lunatic, and committed to the state asylum for the insane, where he remained continuously until August 18, 1904, when he was discharged as restored to his right mind.

A duly certified copy of the inquisition proceedings whereby he was committed to the asylum was filed in the probate court of Lincoln county, and application was made there for the appointment of a guardian for Healy's person and estate, and the court appointed **John F. Linker** as such guardian April 19, 1897. Linker took immediate possession of the estate, returned an inventory thereof, sold personal property under orders of the court, paid the debts and generally managed the estate as guardian, and made reports to

the court. The real estate had been mortgaged by Healy and his wife in 1891—the land mortgaged consisting of 160 acres, the north half of which was owned by the wife. She died leaving five children and her husband as her heirs. Afterward, and on March 13, 1897, one Fitzpatrick, the then owner of the mortgage, began a suit of foreclosure in Lincoln county. Service of summons upon Linker as guardian was the only service or notice given to Healy. All the other interested parties were duly and properly served with summons.

On August 27, 1897, more than four months after the appointment of Linker, the probate court of Shawnee county, Kansas, appointed one Strauss, of that county, guardian of the estate of Healy. Strauss qualified as guardian, but did nothing whatever under his appointment except make a final report when he was discharged after the restoration of Healy to sanity.

In the foreclosure suit the land was duly sold to the plaintiff, Fitzpatrick. The sale was confirmed and a sheriff's deed executed. Fitzpatrick retained possession of the land until January 18, 1900, when he sold it to the plaintiff in error, who bought in good faith and for full value.

Healy claims the right to redeem upon the ground that the probate court of Shawnee county, where he was adjudged to be insane, had the exclusive power under the statute to appoint a guardian, and therefore the appointment of Linker in Lincoln county and the service of summons upon him were void and the court did not acquire jurisdiction of Healy in the foreclosure suit. This presents the principal question in the case, and the only one if the appointment of Linker was valid.

The sections of the statute bearing most directly upon this question are sections 3941 and 3945 of the General Statutes of 1901, which so far as applicable read:

“SEC. 3941. If information in writing is given to the

Foran v. Healy.

probate court that any one in its county is an idiot, lunatic, or person of unsound mind, or an habitual drunkard and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury."

"SEC. 3945. . . . Upon the return of the verdict the same shall be recorded at large by the probate judge, and if it appear that the person is insane, and is a fit person to be sent to the insane asylum, the court shall enter an order that the insane person be committed to the state insane asylum. . . . And if it be found by the jury that the subject of the inquiry is of unsound mind, or an habitual drunkard and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such person."

It is claimed that the words "the court," used near the close of the section last quoted, refer exclusively to the court in which the inquisition was held, and that this language is clear, specific, and conclusive. In support of this contention sections 3948, 3977 and 3978 of the General Statutes of 1901 are cited, which read:

"SEC. 3948. The court may, if just cause appears at any time during the term at which an inquisition is had, set the same aside and cause a new jury to be impaneled to inquire into the fact."

"SEC. 3977. If any person shall allege, in writing, verified by oath or affirmation, that any person declared to be of unsound mind . . . has been restored to his right mind, . . . the court by which the proceedings were had shall cause the facts to be inquired into, either by a jury or without a jury, as may seem proper to the court.

"SEC. 3978. If it shall be found that such person has been restored to his right mind . . . he shall be discharged from care and custody, and the guardian shall immediately settle his accounts, and restore to such person all things remaining in his hands belonging or appertaining to him."

It is urged that the probate court of Lincoln county

could not appoint a guardian for the person of Healy without having personal jurisdiction of him, which it did not have, as he was then in an asylum outside of that county and received no notice of the application for the appointment. On the other hand, it is insisted by the plaintiff in error that section 3941 of the statutes was enacted to provide for a special purpose, and should not be permitted to interfere with the operation of other sections of that chapter according to their apparent design; and that this section was intended to give jurisdiction over insane persons in counties where they do not reside, but are merely found, so that the public might thereby be protected from the danger and annoyance of such persons. In other words, it was intended to meet the very contingency shown by the facts of this case.

In the organization of our courts it seems to have been intended that all proceedings relating to real estate and the settlement of estates should take place where the subject-matter of such proceedings are located. This purpose is indicated by the various statutes to such an extent that it may be regarded as the settled policy of the state. Statutes relating to these subjects should therefore be construed so as to harmonize with this policy, where a contrary purpose is not clearly expressed. In discussing the question whether or not a guardian for minor children should be appointed where the minors reside, Mr. Justice Atkinson, in the case of *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164, said:

"It is the policy of the law to give to the individual a near-by and convenient court. Save in exceptional cases, hardships have not been visited upon the citizen by requiring him, at the expense of time and means, to respond over long distances to the process of the courts. The jurisdiction of tribunals having judicial powers has wisely been limited in that particular. In pursuance of this policy of the law there has been established by the legislature a probate court in each county of the state. The undoubted purpose of the

Foran v. Healy.

legislature in so doing was to give the inhabitants of each county a near-by and convenient tribunal having jurisdiction of probate matters. It will hardly be urged that an exception to these favors in the law was intended by the legislature to be made against the resident minors. . . .

"The mere fact that the legislature failed to designate specifically, in the act relating to guardians and wards, what probate court should acquire jurisdiction of the persons and estates of minors will not be presumed to have been intended to operate against the minor; nor should it be construed to his disadvantage, if equally susceptible of two constructions. If, as in the case at bar, the county adjoining that of the minor's domicile had jurisdiction of the person and estate of the minor, as was sought to be exercised by the probate court of Elk county, then any county in the state, no matter how remote, especially where there chanced to be property belonging to his estate, would have, or could acquire, jurisdiction. This might not only result in much inconvenience, and be also used to the minor's disadvantage in administering the affairs of the estate, but the distance would necessitate added and unnecessary expense." (Pages 94, 95.)

In that case, there being no place designated by statute, the court, in harmony with this general policy of the law, held that jurisdiction belonged to the county where the minors resided.

In this case, however, there is more difficulty, as the language of sections 3941 and 3945, when construed together, furnish some reason for the contention of the defendant in error that the words "the court," as used in the last clause of section 3945, refer to the court holding the inquisition. We appreciate this difficulty, but think it more apparent than real. We feel satisfied in holding that section 3941 is in the nature of a police regulation, intended to protect the people of every county from the annoyance and danger incident to the presence of strange, homeless lunatics wandering about without restraint. With this disposition of that section, the whole act is in harmony with the general policy of the state, and the rule announced

Foran v. Healy.

in the case of *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164, applies to its provisions and fixes the jurisdiction of the person and estate of Healy in the probate court of Lincoln county. This preserves the general symmetry of the statutes as a whole, and eliminates many difficulties and incongruities which would otherwise result.

This very case illustrates some of the mischievous consequences which might result under a different rule. Healy was found to be insane, a resident of Lincoln county, and without an estate in Shawnee county. No necessity appearing for the appointment of a guardian, none was appointed until several months after the appointment of Linker in Lincoln county. Why the appointment was made in Shawnee county does not appear. This guardian took no steps to find or administer upon the Lincoln county estate of his ward, or to do anything whatever as such guardian.

Healy left his family, a farm and personal property in Lincoln county. He might have wandered into a county where the court could not have ascertained even the place of his residence. In such a case the guardian would not have known where to look for the property or family, and the family would not have known where to apply for the service of a guardian. Many difficulties might be suggested which would make such a rule very inconvenient and objectionable. It may be said that these considerations belong to the legislature rather than to the court, and this would be true if the legislature had spoken in unmistakable terms upon this subject, but, as it has not done so, courts in choosing between interpretations of the statute may well consider such matters in determining the legislative intent. We conclude that Healy had a permanent residence, a home, family, and estate, real and personal, in Lincoln county. Becoming insane there, he could not change his residence.

The probate court of Shawnee county had juris-

Foran v. Healy.

diction of the person of Healy for the purpose of determining the question of his sanity only. Its adjudication of this question was final and conclusive everywhere and upon all persons. Under these circumstances the probate court of Lincoln county had jurisdiction to appoint a guardian to take possession of the estate, real and personal, belonging to such lunatic, and to represent his interests therein. Service upon such guardian, in any suit or proceeding in which the estate of such lunatic was involved, is binding upon such lunatic.

The fact of lunacy gives jurisdiction to the probate court where the lunatic resides and has an estate to appoint a guardian to represent the interests of such lunatic, but this jurisdictional fact of lunacy need not necessarily be first adjudicated by such court. It will be sufficient to accept and act upon any valid adjudication thereof.

The district court had jurisdiction of Healy in the foreclosure proceedings, and he is bound thereby. This conclusion makes it unnecessary to consider the other questions presented.

The judgment of the district court is reversed, with direction to enter judgment for the defendant, Timothy Foran, for costs.

All the Justices concurring.

OPINION DENYING A PETITION FOR A REHEARING.

(86 Pac. 470.)

SYLLABUS BY THE COURT.

1. **INSANE PERSONS**—*Jurisdiction of Probate Court.* Except as limited by the statutes, probate courts in this state have the same power over the person and estate of lunatics that was formerly possessed by courts of chancery under the common law.
2. ——— *Appointment of a Guardian—Notice.* In the absence of a statutory requirement no notice is necessary to confer authority upon a probate court to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind.

The opinion of the court was delivered by

GRAVES, J.: A petition for a rehearing has been filed herein which suggests that the opinion heretofore filed did not consider one of the vital questions involved in the case. It is urged that before the probate court of Lincoln county could appoint a guardian for the estate of Joseph Healy notice of such intended action must have been served upon him; that until service of such notice the court was without jurisdiction to consider such appointment, and any action taken was in violation of important constitutional rights and amounted to an arbitrary usurpation of power.

As the probate court of Lincoln county did make the appointment without such notice, this question is important. Upon a reexamination of the case we find that, while this specific question was suggested in argument, it was not seriously discussed and did not receive the attention in the opinion which it probably deserved, and we therefore deem it proper to consider it further at this time.

Courts of chancery have for centuries been regarded as the general guardians of infants, lunatics, and other incompetents, and have exercised their powers as such, through persons appointed by them for that purpose. The power of chancery courts in this respect has been generally recognized in this country the same as in England. From considerations of public convenience the powers of chancery courts in this respect have been by the statutes of most states conferred upon probate courts or other tribunals in each county. These local courts are generally recognized as possessing full chancery powers concerning the appointment of guardians, except where limited by the statute under which this duty is imposed. (1 Black. Com., Cooley's 4th ed., p. 464, note 1; 9 Encyc. Pl. & Pr. 890-892, and notes; *Fox v. Minor*, 32 Cal. 111, 116, 91 Am. Dec. 566; *Sprigg v. Stump*, 8 Fed. 207, 214.)

Foran v. Healy.

In the case of *The Board of Children's Guardians of Marion County v. Shutter*, 139 Ind. 268, 272, 34 N. E. 665, 31 L. R. A. 740, it was held that "the power to appoint guardians for infants, idiots, and lunatics, conferred by the statute, is merely declaratory of the power they already possessed." In the absence of statutory requirements no notice is necessary to confer authority upon a probate court to appoint a guardian, either for a minor or a lunatic who has been duly adjudged to be a person of unsound mind. (*Kurtz v. St. Paul & Duluth R. Co.*, 48 Minn. 339, 342, 51 N. W. 221, 31 Am. St. Rep. 657; *Swope's Adm'r v. Frazier's Committee* [Ky.], 37 S. W. 495; *Heckman v. Adams*, 50 Ohio St. 305, 34 N. E. 155; *Martin L. Leffel v. Henry C. Knoop*, cited in *Heckman v. Adams*, *supra*, but not reported; *Van Matre v. Sankey et al.*, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196.)

In the case of *Heckman v. Adams*, *supra*, the lunatic was regularly adjudged to be of unsound mind, and was sent to the asylum for the insane. Eight months afterward a guardian of her estate was appointed without notice. It was held that no notice was necessary, the statute not requiring it. The appointment was made because of the former adjudication, upon which the lunatic had notice.

By the appointment of a guardian for the estate of a person of unsound mind no constitutional right is involved. He is not thereby deprived of any property; on the contrary, his property is protected and preserved by the court, whose ward he is, through its officer, who has been required to give bond for the faithful and honest performance of his duty. In this state full authority has been conferred upon the probate courts to exercise this power. (Const. art. 3, § 8; Gen. Stat. 1901, § 155.) The statute confers this duty in broad and unrestricted terms. It reads: -

"If it be found by the jury that the subject of the inquiry is of unsound mind, . . . the court shall

Foran v. Healy.

appoint a guardian of the person and estate of such person." (Gen. Stat. 1901, § 3945.)

It follows that whenever it is made to appear to the probate court that any person within its jurisdiction has been duly and legally found by a jury to be a person of unsound mind, it then becomes the duty of such court to appoint a guardian for such person. Usually the adjudication of lunacy and the appointment of a guardian take place in the same court and at the same time. In such a case notice is indispensable upon the question of lunacy, but when that fact is established the guardianship follows as a matter of course. There are cases which apparently hold that the appointment of a guardian should be after notice to the lunatic, but in all of these cases which have been brought to our attention the adjudication of lunacy occurred at the same time that the guardian was appointed and the notice was necessary on that account.

When the judgment of the probate court of Shawnee county was presented to the probate court of Lincoln county, as evidence that Joseph Healy was a person of unsound mind, that court decided the question of lunacy, just as every court determines the facts upon which its jurisdiction depends. If the Shawnee county court had appointed the guardian it would have acted upon the same evidence that was before the court in Lincoln county. Healy was never before the Shawnee county court for any purpose except to defend against the complaint of insanity.

Every probate court when it appoints a guardian for a person of unsound mind does so upon the findings of lunacy by the jury. No notice is ever given or necessary to answer as to whether a guardian shall be appointed. The petition for a rehearing is denied.

All the Justices concurring.

Spaulding v. Pepper.

H. W. SPAULDING *et al.*, as Partners, etc., v.
W. R. PEPPER.

No. 14,596. (85 Pac. 754.)

SYLLABUS BY THE COURT.

MASTER AND SERVANT—Action for Wages—Forfeiture—Pleading and Proof. In an action for the recovery of wages and expenses under a contract of hiring, an answer which merely disputes the length of time the plaintiff was in the defendant's service and pleads payment is insufficient to authorize a forfeiture of all compensation on the ground of dishonesty and other flagrant misconduct.

Error from Kingman district court; PRESTON B. GILLETT, judge. Opinion filed May 12, 1906. Modified.

George L. Hay, for plaintiffs in error.

George W. Freerks, M. C. Freerks, and C. W. Fairchild, for defendant in error.

The opinion of the court was delivered by

BURCH, J.: The defendants are partners engaged in the manufacture and sale of buggies and other vehicles. They employed the plaintiff to work for them as collector, agreeing to pay him eighty-five dollars per month and traveling expenses. The contract provided that it should not take effect until a bond for the faithful performance of the plaintiff's duties was given and approved, and further provided that the plaintiff might be discharged for incompetency, immorality, or failure to comply with instructions. His instructions covered the subjects of stated reports of business done, the keeping of accounts, the remittance of cash collected, and the forwarding of renewal notes. The defendants undertook to forward drafts to cover the items of the plaintiff's expense accounts as soon as reports were received, so as to keep seventy-five dollars for expense money always with him.

The employment was terminated at a time when the

Spaulding v. Pepper.

plaintiff had in his possession a considerable sum of the defendants' money and a number of notes belonging to them. A replevin action was instituted for the notes, which were later delivered to the defendants, but the plaintiff continued to retain the cash.

Afterward the plaintiff instituted the action from which this proceeding in error arises to recover his wages, charging the defendants with the amount due on that account and the amount of his traveling expenses, and giving the defendants credit for money he had received. The defendants answered pleading payment, and pleading facts showing that the plaintiff had been in their service for a shorter period than that stated in the petition. These facts were the failure to give bond at the commencement of the service, and a discharge for incompetency, immorality and failure to obey instructions before the date the plaintiff claimed his employment ceased. A counter-claim for moneys of the defendants received and retained by the plaintiff was added to the answer.

On the trial the jury returned a verdict for the plaintiff. The evidence introduced by the defendants would bear the interpretation that the plaintiff had been quite remiss in following instructions. Because of this fact, and because of the plaintiff's retention of the defendants' money and notes after his discharge, it is claimed the plaintiff forfeited all compensation; and the court was requested to instruct the jury upon that theory. The refusal of the court to give such instructions gives rise to the only substantial law question in the case.

The contract did not go to the extent of forfeiting compensation for time which had elapsed in the event of a discharge for incompetency, immorality, or disregard of instructions. Those facts having been considered by the parties and made the subject of a special agreement, the law should not, ordinarily, annex penalties beyond those stipulated for. But conceding that

Spaulding v. Pepper.

the conduct of the plaintiff was sufficiently culpable to justify the application of the rule sometimes invoked in cases of embezzlement (*Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72), and other flagrant acts of dishonesty and crime (*Turner v. Kouwenhoven*, 100 N. Y. 115, 2 N. E. 637), the answer went no further than to dispute the length of time the service continued and to allege payment of the indebtedness described in the petition. The claim of a forfeiture of compensation is therefore not within the contemplation of the answer. That such a forfeiture is a matter of defense is clear, and consequently the facts upon which it is based must be pleaded. This being true, the requested instructions were rightfully refused, and the special questions which the court refused to submit to the jury were rightfully withheld.

The defendants submitted to the jurisdiction of the court by giving a forthcoming bond for the attached property. The signature used as a basis for comparing handwriting appears to have been *prima facie* proved.

Under the long-established practice in this state the general assignment of "error of law occurring at the trial" as a ground for a new trial is not limited by the specific mention of grounds which by construction might have been included within it.

No answer having been made to the sixth assignment of error, the judgment of the district court will be modified by reducing it \$15.20. As modified, the judgment is affirmed. The costs in this court are divided.

All the Justices concurring.

A. H. BENNETT, *Doing Business as the Bennett Commission Company*, v. M. T. CUMMINGS.

No. 14,597. (85 Pac. 755.)

SYLLABUS BY THE COURT.

1. **CONTRACTS—*Purchase and Sale.*** Where one dealer solicits another to make an offer to buy certain produce, the latter wires such an offer, giving terms in full, and the former sends an answer in the form of a statement that he will sell the produce mentioned, repeating the very terms of the offer, a contract of purchase and sale is thereby effected.
2. ——— ***Terms as to Time of Delivery—Acquiescence.*** In such a case, where a time of delivery is mentioned in the request for an offer, a shorter time is named in the offer, and the final telegram is silent on the subject, circumstances may justify treating such silence as an acquiescence by the seller in the time proposed by the buyer; and *held*, that such circumstances exist in the present case.
3. ——— ***Acceptance—Condition that the Law Would Imply.*** Where the acceptance of an offer is otherwise sufficient it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply in any event.

Error from Marshall district court; SAM KIMBLE, judge. Opinion filed May 12, 1906. Reversed.

M. M. Miller, and *W. S. Glass*, for plaintiff in error;
Eugene S. Quinton, of counsel.

L. M. Pemberton, for defendant in error.

The opinion of the court was delivered by

MASON, J.: A. H. Bennett, of Topeka, who does business under the name of the Bennett Commission Company, brought an action against M. T. Cummings, of Beatrice, Neb., to recover damages for the failure of the latter to comply with a contract for the sale to the former of a quantity of corn. Upon the trial the defendant objected to the introduction of any evidence under the petition for the reason that it failed to state

Bennett v. Cummings.

facts sufficient to constitute a cause of action. The court sustained the objection and rendered judgment, which the plaintiff now seeks to reverse.

The negotiations between the parties which the plaintiff claims culminated in a contract were conducted by the interchange of telegrams and letters while one was in Topeka and the other in Beatrice. The contention of the defendant is that this correspondence consisted merely of a series of propositions and counter-propositions, and never resulted in a definite offer and acceptance; that the minds of the parties never met upon all the essential elements involved, and consequently no contract was ever entered into; and that all of the communications having any color of acceptance were qualified by new conditions which prevented them from being such in fact. Whether this contention is sound is the sole matter to be here determined. The disputed questions of law might perhaps be adequately presented by means of an abridgment of the correspondence referred to; but in order that every detail of the controversy may be exhibited it is deemed expedient to show in full all communications that passed between the parties, as alleged in the petition. They were as follow :

1.—Telegram.

“BEATRICE, NEB., May 18, 1903.

“*Bennett Commission Company, Topeka, Kan.:*

“Give me best bid 10,000 No. 3 white corn or better, same No. 3 mixed corn or better, to be delivered to Union Pacific railway at Beatrice within fifteen days.

M. T. CUMMINGS.”

2.—Telegram.

“TOPEKA, KAN., May 18, 1903.

“*M. T. Cummings, Beatrice, Neb.:*

“Will pay forty-one cents per bushel for 5000 bushels No. 3 or better mixed corn at Kansas City, and will pay forty-two cents per bushel for 5000 bushels No. 3 or better white corn at Kansas City. Reply instantly; one week for shipment.

BENNETT COMMISSION COMPANY.”

Bennett v. Cummings.

3.—Telegram.

"BEATRICE, NEB., May 18.

"Bennett Commission Company, Topeka, Kan.:"

"Will sell you 5000 bushels No. 3 or better mixed corn on track at Kansas City at forty-one cents per bushel, and 5000 bushels of No. 3 or better white corn on track at Kansas City at forty-two cents per bushel. Terms good firms.

M. T. CUMMINGS."

4.

"M. T. CUMMINGS, Grain.

"BEATRICE, NEB., May 18, 1903.

"Bennett Commission Company, Topeka, Kan.:"

"DEAR SIRs—I hoped in the attached message to interest you in my desire to sell 10,000 bushels each of white and mixed corn on the Union Pacific. Am shelling from my own cribs here. I would not want to sell for inspection beyond Kansas City, and yet we think that if any corn is safe to ship further south this corn would be. I have quite a line of it left, and if you are strong in the market should like to have your bids from time to time.

Yours truly,

M. T. CUMMINGS."

5.

"M. T. CUMMINGS, Grain.

"BEATRICE, NEB., May 18, 1903.

"Bennett Commission Company, Topeka, Kan.:"

"DEAR SIRs—This will confirm sale to you of 5000 bushels 3 or better mixed and 5000 bushels 3 or better white corn at forty-one and forty-two cents, respectively, track Kansas City. Am hoping this will turn out to be Topeka terms. We are not partial to Kansas City and would it to be good firms, if that destination, which your message seems to indicate. In any event would not want terms south of Kansas City. Have had all the grief I can stand for this season. This, however, will be corn from my cribs, and if any corn is safe to send south without kiln-drying I think this would be. I do not care to dabble in that market at my own risk, however—never again, forever.

Yours truly,

M. T. CUMMINGS.

"Am trying to get shelling started tomorrow, and think can get it forward within the week's time.—M. T. C."

Bennett v. Cummings.

6.—Confirmation of purchase.

"THE BENNETT COMMISSION COMPANY.

"TOPEKA, KAN., Sta. A., May 18, 1903.

"*M. T. Cummings, Beatrice, Neb.:*

"DEAR SIR—This confirms our purchase from you to-day, per wire, of 5000 bushels of 3 or better white corn at forty-two cents, track Kansas City, subject to Kansas inspection, destination weights, to be shipped from Beatrice, Neb., in seven days *via* Union Pacific railway, and billed to us at Topeka, Kan.

Yours very respectfully,
THE BENNETT COMMISSION COMPANY.
By F. H. B."

7.—Confirmation of purchase.

"THE BENNETT COMMISSION COMPANY.

"TOPEKA, KAN., Sta. A, May 18, 1903.

"*M. T. Cummings, Beatrice, Neb.:*

"DEAR SIR—This confirms our purchase from you to-day, per wire, of 5000 bushels of 3 or better mixed corn at forty-one cents, track Kansas City, subject to Kansas inspection, destination weights, to be shipped from Beatrice, Neb., in seven days *via* Union Pacific railway, and billed to us at Topeka, Kan.

Yours very respectfully,
THE BENNETT COMMISSION COMPANY.
By F. H. B."

8.

"M. T. CUMMINGS, Grain.

"BEATRICE, NEB., May 19, 1903.

"*Bennett Commission Company, Topeka, Kan.:*

"DEAR SIR—I have your favor of the 18th with confirmations, which I note read Kansas City grades, 'destination weights.' Please advise where and by whom this grain is supposed to be weighed. In selling to local trade beyond Kansas City and outside Memphis I have been getting settlement on my own weights, and other terms would not look attractive nor satisfactory. Even Memphis weights would carry with them some proviso as to who the weighing firms should be. Yours truly, M. T. CUMMINGS.

"Are you not fixed to give me Topeka terms on this stuff?—M. T. C."

Bennett v. Cummings.

9.

"TOPEKA, KAN., May 20, 1903.

"M. T. Cummings, Beatrice, Neb.:"

"DEAR SIR—Acknowledging your two favors of the 19th, allow us to say that as our confirmation shows we expect to give you Kansas state inspection, and will add that we also expect to give you Topeka weights. We have no intention of asking you to accept destination weights at a little interior point where weighing is not reliable.

Yours truly,

THE BENNETT COMMISSION COMPANY."

10.

"TOPEKA, KAN., May 23, 1903.

"M. T. Cummings, Beatrice, Neb.:"

"DEAR SIR—The party to whom we sold corn bought from you is already beginning to make inquiries as to its arrival, and we presume that it will be imperative that all bills of lading and weigh bills be dated within the time limit of the contract in order to have the grain applied thereon. Please hurry this matter up as rapidly as you can.

Yours truly,

THE BENNETT COMMISSION COMPANY."

11.

"M. T. CUMMINGS, Grain."

"BEATRICE, NEB., May 25, 1903.

"Bennett Commission Company, Topeka, Kan.:"

"DEAR SIR—I note your letter of the 23d. Also that to-day is last day of our trade. I shall be down the road to-day and if I can get anything forward will do so, but the heavy rains have probably put us clear out this time. Yours truly, M. T. CUMMINGS."

The plaintiff maintains that the three telegrams resulted in a complete contract, which was confirmed by the subsequent letters, and was never abrogated. The defendant insists that the third telegram was not the acceptance of the offer made in the second one, but was merely the submission of an independent proposition which the plaintiff might accept or reject. The connection between the telegrams, however, is too obvious and too intimate to be ignored. The seller wires to the buyer asking for an offer. The offer is made. The seller then replies, but instead of referring in terms

Bennett v. Cummings.

to the message he has received and either accepting it or proposing a modification, he states in detail what he is willing to do. Under the circumstances stated, if the essential features of the trade indicated in the last telegram are identical with those of the one preceding it, it is in effect an acceptance of it, and requires no answer in order to complete the contract. The two telegrams correspond exactly except that in the last there is no reference to the time of delivery, and the words "terms good firms" are added.

The matter of time is of course important, and unless it was agreed upon there could have been no meeting of the minds of the parties. The first telegram sent by Cummings solicited an offer and referred expressly to the time of shipment, placing it within fifteen days. In response to this Bennett submitted an offer reducing the time to one week, and asking an immediate reply. An answer was at once made which restated the other terms of the sale, but was silent as to the time. The consideration of time cannot be thought to have been overlooked. That it was given attention by both parties is manifest from the first two telegrams. And in view of this fact it cannot be supposed that Cummings when he sent his last dispatch intended to leave the time of delivery open. He must be deemed either to have stood upon his own first proposal in that regard or to have acquiesced in the modification made by Bennett. Inasmuch as Bennett in his offer distinctly placed the time of shipment at one week, and asked an immediate reply, and as an immediate reply came which was absolutely silent as to this feature of the case, we decide that such silence under the circumstances is fairly to be interpreted as an acceptance of the conditions imposed in this respect by Bennett. That it was so intended by Cummings is apparent from the fact that in his letter following his second telegram and written on the same day (communication No. 5) he undertook to confirm,

Bennett v. Cummings.

not merely an unaccepted offer on his part to sell, but an actual sale of the corn described, and added that he thought he could get it forward "within the week's time," reference obviously being had to the time proposed by Bennett and accepted by him.

If the words "terms good firms" added to the second telegram sent by Cummings imported a new condition they of course prevented its operating as an acceptance of Bennett's proposal. However blind the expression may seem in itself, it is not difficult to attach a meaning to it when it is read in the light of the whole correspondence. It clearly meant that the corn was to be weighed at its destination by responsible business men—that Cummings did not bind himself to accept weights made by unreliable people. In the absence of a special agreement there was no obligation on his part to do so. The words used did not affect the contract between the parties. The situation was the same as though Cummings had said: "I reserve the right to insist upon honest weights." The mere declaration of a matter which the law clearly implied was not the addition of a new term.

Since we hold that a complete agreement for the sale and purchase of the corn resulted from the interchange of the communications thus far specifically mentioned, it is unnecessary to discuss the remainder of the correspondence further than to say that at no stage of the negotiations could it be contended with any plausibility that Bennett had abandoned the contract or otherwise forfeited his right to demand its performance. Indeed, no serious differences appear to have arisen between the parties. Their subsequent letters have the color of discussions relating to the interpretation to be placed upon a contract already entered into, or to concessions that might be made as a matter of grace upon one side or the other. If there were any misconceptions upon either side, or upon both, of the effect of the contract, or if by common consent its terms were

Samson v. Zimmerman.

modified, neither fact is now important. We are concerned here only with the inquiry whether the petition stated a cause of action—that is, whether the correspondence it sets out shows a completed agreement. This question being answered in the affirmative, it results that the judgment must be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

C. L. SAMSON, as *Administratrix, etc.*, v. WILLIAM ZIMMERMAN.

No. 14,598. (85 Pac. 757.)

SYLLABUS BY THE COURT.

1. PRACTICE, SUPREME COURT—*Findings and Verdict—Presumption.* In a trial where one special finding of the jury is apparently adverse to, and destructive of, the general verdict, if there be any material fact in issue which was not submitted to the jury for a special finding, and which if found favorably to the general verdict would support it and overcome the adverse finding, then it must be presumed that the jury determined such omitted fact in harmony with the general verdict. In other words, all the facts in issue which are not specially found should be presumed to have been determined in accordance with the general verdict.
2. CONVEYANCE—*Breach of Covenant—Damages.* A grantor of real estate by a deed of general warranty is responsible in damages to his grantee when a final judgment is rendered evicting the grantee from possession of the premises or awarding the title or any portion thereof to another upon any alleged right or lien antedating the conveyance, provided the grantor has proper notice to appear and defend such action, or does in fact appear therein; and this notwithstanding the judgment is based upon an erroneous finding that the grantor was not the full and free owner of the premises at the time of the conveyance. The grantor must defend according to his covenant, and if he fails in his defense it is at his own peril.

Error from Shawnee district court; ROBERT C. HEIZER, judge *pro tem.* Opinion filed May 12, 1906. Reversed.

STATEMENT.

THIS action was brought by Johanna Henrietta Zimmerman, since deceased, against the defendant, William Zimmerman, in the district court of Shawnee county, to recover damages for the breach of a warranty in a deed executed by the defendant to the plaintiff in 1883, purporting to convey certain real estate in that county, with the usual covenants of warranty and for the consideration of \$1500. The case was tried to a jury, and they returned the following verdict, omitting the title, viz.:

"We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess her damages at fifteen hundred dollars.

J. M. ORNER, *Foreman.*"

In addition to the general verdict the court submitted the following questions, and the jury returned the following answers thereto:

"(1) Ques. At the time of the execution of the deed in controversy, was the defendant the owner of the lots on Topeka avenue? Ans. Yes.

"(2) Q. If you answer question No. 1 in the negative, then state what interest he had in the premises? A. _____.

"(3) Q. If anything was paid, how and with what did she pay therefor? A. We have no evidence just how or in what manner this was paid—whether in draft, check, or currency.

"(4) Q. Did William Zimmerman receive anything for this property or for making the deed? A. Yes.

"(5) Q. If yes, how much did he receive? A. Fifteen hundred and fifty dollars.

"(6) Q. How and in what manner was this received? A. We have no evidence just how or in what manner this was paid—whether in draft, check, or currency."

The jury were discharged without a motion from either party to change or correct in any way any matter appearing in the special findings. And thereafter, without a motion by either party for a new trial, the

Samson v. Zimmerman.

defendant filed a motion for judgment in his favor upon the special findings of the jury notwithstanding the general verdict, and the plaintiff filed a motion for judgment on the general verdict in her favor notwithstanding the special findings of fact. The court denied the motion of the plaintiff and allowed the motion of the defendant, and adjudged that the plaintiff take nothing by her action and that the defendant recover his costs. At some stage of the proceedings the plaintiff died, and the action was brought here by the administratrix of her estate to reverse the judgment.

A. B. Jetmore, for plaintiff in error.

Loomis, Blair & Scandrett, for defendant in error.

The opinion of the court was delivered by

SMITH, J.: The case was brought here on a transcript, and of course does not include the evidence, nor the instructions to the jury; so practically the only question presented for our determination is whether the court should have rendered judgment upon the general verdict in favor of the plaintiff, or, in other words, whether the court erred in disregarding the general verdict and rendering judgment upon the special findings of fact in favor of the defendant.

It will be observed that the general verdict is in favor of the plaintiff, and all the special findings of fact are favorable to the plaintiff, unless it be No. 1. To determine whether there is an irreconcilable conflict between finding No. 1 and the general verdict we must examine the pleadings to see what were the issues. The plaintiff in her petition made the following allegations:

(1) The execution and delivery of the deed for the consideration of \$1500 paid, a copy of which is attached to the petition and which contains a general covenant of warranty in the usual form, viz.:

"That at the delivery of these presents he is lawfully

Samson v. Zimmerman.

seized in his own right of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above-granted and described premises, with the appurtenances; that the same are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of what nature or kind soever; and that he will warrant and forever defend the same unto said party of the second part, heirs and assigns, against said party of the first part, his heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same."

(2) "Plaintiff alleges that defendant, William Zimmerman, his heirs and executors, have not warranted and defended said described real estate with the appurtenances to the plaintiff, her heirs and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same, as he was bound to do; but on the contrary plaintiff avers that at the time of the execution and delivery of said deed the paramount title and freehold of the undivided two-thirds of said real estate was in William Opp and Philip Zimmerman; that by virtue of said paramount title the plaintiff afterward, to wit, at the September term, 1901, of the district court of Shawnee county, Kansas, in an action wherein said William Opp was plaintiff and the heirs of Philip Zimmerman, and the defendant, William Zimmerman, were defendants, the said William Zimmerman then and there appearing thereto and having full knowledge thereof, he not having good and sufficient title thereto, by the consideration of said court, plaintiff was dispossessed, and evicted out of and from the undivided two-thirds of said real estate and all the appurtenances thereof, by due course of law, and so the said defendant, William Zimmerman, his heirs and executors have not kept and performed his covenants in said deed, but have broken and made breach of the same."

(3) That plaintiff had expended \$500 in defending said action, and had sustained damages by reason of the premises in the sum of \$1500, ending in a prayer for judgment for \$1800. On leave, the plaintiff afterward filed supplementary allegations and amendments to her original petition, as follow:

"Now comes the plaintiff, Johanna Henrietta Zim-

Samson v. Zimmerman.

merman, and by way of amendment and supplementary petition in addition to her original petition herein, says: That the defendant, William Zimmerman, with the intent to cheat and defraud the plaintiff, and in utter disregard of his covenants for title contained in said deed, did, as plaintiff has been informed and believes, induce said William Opp, as plaintiff, to institute said action in said district court, and make him a co-defendant; that said defendant appeared in said action and refused to protect and defend his covenant for title in said deed, as he was bound to do, but claimed to own the title and estate to and in said real estate, notwithstanding said covenant for title in his said deed; that in furtherance of said fraud, and during the pendency of said action, Mary M. Zimmerman, the wife of said defendant, with the knowledge and approbation of said defendant, and in furtherance of the intention of said defendant to cheat and defraud the plaintiff, in his refusal to defend said title, on or about the 28th day of May, 1901, during the pendency of said action, with full knowledge of all the facts and to assist the defendant in cheating and defrauding the plaintiff, for a nominal consideration, procured the said William Opp to, and who did, by his deed of that date, convey and transfer said real estate to her, the said Mary M. Zimmerman, and who, in virtue of said deed, claims to own the interest of said William Opp in said real estate.

"Plaintiff further states that in pursuance of the judgment and order of the said district court, rendered in said action, said real estate was by the sheriff of Shawnee county, Kansas, duly sold at public auction on the 19th day of May, 1902, and that plaintiff, in order to preserve her rights, interest and estate in said real estate, at said sheriff's sale was compelled to and did bid in and buy said real estate, for the price and consideration of \$2000; the defendant being present at such sale, and refused to protect and defend his said covenants for title contained in said deed as he had obligated himself to and was bound to do."

To this petition, as amended and supplemented, the defendant filed the following answer:

"Now comes said defendant, William Zimmerman, and for his answer to the plaintiff's petition, and to

the 'amendment and supplementary petition' herein filed:

"(1) Denies each and every allegation made or contained in said petition, and in said 'amendment and supplementary petition.'

"(2) And for a second and further answer herein, this defendant says that said plaintiff never did, nor did any person for her, ever pay to said defendant, or to any person for him, any consideration whatever for said property, or for the making of said deed, and that there was no consideration for said deed or any covenant therein contained.

"(3) And said defendant says that he executed said deed, of which a copy is attached to said plaintiff's petition, only to enable said plaintiff to become surety for said defendant and for Philip Zimmerman and other employees of said defendant upon bail-bonds, recognizances, undertakings, or other bonds for the appearance in any court of said William Zimmerman or said Philip Zimmerman, or other employees of said defendant, to answer in prosecutions for violation of the prohibitory laws of the state of Kansas, which were then threatened against them or which they apprehended, and to invest said plaintiff with the record title to sufficient property so that she would be accepted as such surety; that said plaintiff never became such surety, and never executed any such bond, recognizance, or undertaking, and never received or paid any liability, money or expenses under or in connection therewith; and defendant says there was no consideration for said deed, or for any of the covenants therein contained."

And to this answer the plaintiff replied as follows:

"The plaintiff, Johanna Henrietta Zimmerman, for her reply to the defendant's answer herein says:

"(1) She denies all and singular the allegations and averments contained in the second and third defenses, and each of them, of said answer.

"(2) For further reply to second and third defenses of said answer, and each of them, plaintiff says that in a certain action pending in this court, wherein one William Opp was plaintiff, and the plaintiff, Johanna Henrietta Zimmerman, the defendant, William Zimmerman, and others were defendants, the said defendant, William Zimmerman, by way of answer

Samson v. Zimmerman.

and cross-petition therein, set up as his cause of action and defense against the plaintiff for the same and identical defenses as set forth in said second and third defenses herein; and that on the 22d day of July, A. D. 1901, by the consideration of said court, the plaintiff recovered a judgment against said defendant, William Zimmerman, upon his said answer and cross-petition for costs of said action, and which judgment is unreversed.

"Wherefore, plaintiff demands judgment as prayed for in her petition in said cause."

From these pleadings it will be noted that the plaintiff asserted that the defendant was not the owner of the two-thirds interest in the land in question at the time of the delivery of the deed, but that William Opp and Philip Zimmerman were the owners of such interest. In the amendment the plaintiff alleged that the defendant induced William Opp to institute the action in which plaintiff was dispossessed and evicted of her interest; that the defendant appeared in that action, and thereupon asserted that he himself owned the "title and estate to and in said real estate"; that in place of defending the title of plaintiff thereto the defendant persuaded Opp to convey an interest in the land to Mary M. Zimmerman, the wife of the defendant, for the purpose of cheating and defrauding the plaintiff herein; that, in pursuance of the order of the court in that action, the sheriff of Shawnee county sold the real estate at public sale, and the plaintiff in this action was compelled to, and did, buy the same for the consideration of \$2000; and that the defendant was present at such sale, and refused to protect and defend his covenants in the deed.

It is rather difficult to tell just what facts the general denial of the defendant to this petition and the supplement and amendment put in issue. The remainder of his answer only goes to dispute the covenants of the deed and to explain the circumstances under which it was given, and the reply of the plaintiff alleged that, in the action in which William Opp was plaintiff and

Samson v. Zimmerman.

both the plaintiff and defendant in this action were defendants, the defendant herein "set up as his cause of action and defense against the plaintiff for the same and identical defenses as set forth in said second and third defenses herein." It will be observed that these are the defenses of no consideration and the purposes for which the deed was given. The court rendered judgment in favor of the plaintiff and against the defendant on these issues in that action.

The pleadings of the plaintiff are very inartistic, yet by a reasonably fair construction she pleads that the question whether the defendant was the owner of the entire fee of the land in controversy at the time of making and executing the deed in question, as well as the question as to the consideration for the deed, was brought in issue in the action in the district court of Shawnee county in which William Opp was plaintiff and this plaintiff and this defendant and others were defendants; and that said issues of fact were both adjudged and determined adversely to the defendant herein. Whether this claim of the plaintiff was supported by evidence we cannot determine from the record. The jury may have believed, and been justified in believing, from the evidence that the claim of the plaintiff of former adjudication was true as alleged, and yet they may have believed from the evidence produced in this action, as set forth in finding No. 1, that as a question of fact the defendant was the owner of the lots in question at the time of the execution of the deed in controversy, notwithstanding the former adjudication to the contrary. If the jury believed and were justified in believing from the evidence in this action according to the above hypothesis, finding No. 1 is not inconsistent with the general verdict.

"All the elements which go to make up a plaintiff's right of recovery are found in his favor by a general verdict for him. And before special findings will avail to overthrow the general verdict they must have determined all those elements against his right of re-

covery." (*Seeds v. Bridge Co.*, 68 Kan. 522, 75 Pac. 480, syllabus.)

In the case of *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633, Mr. Justice Pollock, speaking for the court, said:

"Every presumption is in favor of the general verdict. The special findings must overthrow it or it must stand. In the absence of the evidence from the record, we must assume all of these findings to have support in the evidence and all must be construed together." (Page 759.)

In volume 8 of the American and English Encyclopedia of Law, at page 206, it is said:

"Where the covenantor has been notified by the covenantee to defend an action of ejectment brought against the latter, or where he has appeared and defended, a judgment rendered against the covenantee in such action is conclusive evidence of the paramount title of the plaintiff therein. And in an action on the covenant by the covenantee or his grantee, the covenantor will not be permitted to deny the validity of such judgment; and the covenantee is relieved from the obligation of proving that the title of the plaintiff therein was superior to that of the covenantor, even though the judgment was rendered upon an agreement to which the covenantor was not a party, or though a valid defense might have been made to the action, or though the covenantee, to save himself from eviction under the judgment, purchased the outstanding title, unless the judgment was obtained by collusion or negligence on the part of the covenantee."

If this be the law, and it seems to be supported by authority, the plaintiff in this action might well have pleaded the execution and delivery of the deed, the record and judgment in the Opp case, and that the judgment in the Opp case was not obtained through title derived from the plaintiff after the making of the deed to her by the defendant, and, after alleging her damages, rested her case upon these allegations. Assuming, as we are bound to do, that the allegations of the plaintiff in regard to the former adjudications

The State v. Roupetz.

were found to be true, as the basis of the general verdict, judgment should have been rendered on the general verdict in favor of the plaintiff. As before indicated, there is no essential conflict or inconsistency between the general verdict and finding No. 1.

The judgment of the district court is reversed, and the case is remanded, with instructions to enter judgment in favor of the plaintiff in accordance with the general verdict.

All the Justices concurring.

THE STATE OF KANSAS V. AUGUST ROUPETZ.

No. 14,599. (85 Pac. 778.)

SYLLABUS BY THE COURT.

PRACTICE, DISTRICT COURT—*Withdrawal of Testimony in a Criminal Case—Instructions.* If, during the progress of the trial of a criminal case, testimony which has been introduced is withdrawn by the court, and the court states to the jury that whenever testimony is ruled out they are not to consider it in the case—that it is the same as not given, it is not error to deny a request for a written instruction to disregard such testimony; and a written instruction that the jury in arriving at its verdict should consider all the evidence given by the witnesses is neither erroneous nor misleading.

Appeal from Thomas district court; CHARLES W. SMITH, judge. Opinion filed May 12, 1906. Affirmed.

C. C. Coleman, attorney-general, and Arch L. Taylor, county attorney, for The State; T. L. Bond, of counsel.

Waters & Waters, and C. L. Wilson, for appellant.

The opinion of the court was delivered by

BURCH, J.: August Roupetz was convicted of manslaughter in the first degree, and appeals.

Under the repeated decisions of this court juror Bourgoine was qualified. Threats of the deceased

against appellant's brother, and not involving the appellant himself in any way, were irrelevant. The testimony of witness Frank Kersenbrock that he heard shots fired while he and his father were passing appellant's premises at night could not be prejudicial, especially after the court stated to the jury that the witness could not say appellant fired them.

Early in the progress of the trial, upon the occasion of striking out some testimony, the court said to the jury: "Gentlemen, when the court rules out any evidence you are not to consider it in the case. It is the same as not given; it should be out of your minds entirely." Afterward all the testimony of a witness was withdrawn because his cross-examination developed the fact that he did not understand the nature of an oath or the effect of false swearing. When the evidence was closed the court instructed the jury upon the law of the case, and, referring to the duties of the jurors, said that in determining the intent of the appellant in doing any of the acts charged against him they should take into consideration all the evidence given by the witnesses tending to show what his intention was. It is now argued that the jury had the right to believe the court had taken back in writing what had been stated orally, and that all excluded evidence could be lugged into the case. The court is of the opinion that danger to the appellant from such a fatuity is discernible only by the red and roving eye of imagination. A special instruction, upon the final submission of the case, that the jury should disregard the excluded testimony was properly refused. Two instructions to disregard testimony would constitute a superfluity which even the liberal criminal procedure of this state does not indulge; and after testimony has been withdrawn and is no longer in the case an instruction to disregard it would virtually be an aberrance.

The fact that the deceased said appellant would have

The State v. Roupetz.

to walk over his dead body before appellant should have any of his mother's property was not a threat; was not pertinent to the issues, except that it might have furnished a motive for the homicide; and hence the appellant was not harmed by its exclusion. Besides, the state of feeling between the parties was so abundantly proved, and so many direct and positive threats by the deceased against appellant's life were shown, that the omission of this item could not have affected the verdict.

The cross-examination of appellant with reference to the land difficulty was fairly invited by a number of questions put to him by his counsel. Independent of that fact, it was proper to fix an important date, and was pressed no further than seemed necessary for that purpose.

The cross-examination of appellant in reference to peace proceedings against him was clearly admissible to affect his credibility. The fact that he had been arrested, and after a trial had been put under bond to keep the peace because of threats to kill his father and mother, tended to discredit, disgrace and degrade him, within the rule announced in *The State v. Greenburg*, 59 Kan. 404, 53 Pac. 61, and other decisions of this court.

The instructions of the court given at the time were ample to protect the rights of the appellant if the remarks of the county attorney infringed them. Erroneous instructions relating to murder are immaterial, appellant having been convicted of an inferior crime. Requested instructions fourth, eighth and twentieth invaded the province of the jury, and requested instructions twenty-fourth and twenty-eighth were arguments of the case to the jury from the appellant's standpoint rather than statements of law. It is not the law that the presumption of good character stands until overcome beyond a reasonable doubt, as the sixty-first requested instruction states. It may be over-

Griffith v. Robertson.

thrown by evidence much less conclusive. The sixty-eighth requested instruction was wrong because some of the matters to which it referred did not have a bearing upon the case. The instruction given by the court upon the same subject was correct. Instructions refused and instructions given which are not printed in the brief are not considered. (Rule 10.)

The appellant had a fair trial. The jury apparently gave him the benefit of every doubt, and the judgment of the district court is affirmed.

All the Justices concurring.

**YEWELL GRIFFITH, as Administrator, etc., v. ALEX-
ANDRINA ROBERTSON.**

No. 14,805. (85 Pac. 748.)

SYLLABUS BY THE COURT.

1. **PARENT AND CHILD—Claim against Parent's Estate for Services—Contract—Proof.** Before a daughter can recover from the estate of her deceased mother for services rendered while residing with, and as a part of, her mother's family, it must be shown that an express contract existed between herself and mother that such services should be paid for. It is not essential that the evidence in support of such express contract shall consist of a formal offer and acceptance; it may be established like other disputed facts by any competent testimony.
2. **EVIDENCE—Conversations Had between Deceased and Third Persons.** A daughter or other party prosecuting a claim against the estate of a deceased person is competent to testify to conversations had between the deceased and a third person in the presence and hearing of the witness.
3. **PARENT AND CHILD—Contract for Personal Services—Recovery.** When a daughter nurses and cares for her mother for several years, including the mother's last sickness, under an express contract that payment for such services will be provided for in the will of her mother, who dies intestate, the daughter may recover the reasonable value of such services from the estate of the deceased mother.

73	666
80	384
80	385

Error from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed May 12, 1906. Affirmed.

James Lawrence, and *J. S. Dey*, for plaintiff in error.
W. W. Schwinn, for defendant in error.

The opinion of the court was delivered by

GRAVES, J.: The defendant in error presented a claim against the estate of her deceased mother for personal services, and recovered thereon both in the probate and district courts of Sumner county. The administrator brings the case here for review. The family formerly resided in Scotland, and consisted of George Gunn, his wife, and several children. Three of the adult children came to Kansas, and afterward, in October, 1883, the mother came, leaving her husband and the remaining children in Scotland. Mrs. Gunn owned the land in controversy, and resided thereon. One of her sons lived with her for a time, and later she managed the farm alone, with the aid of hired assistants. In 1895 she sent back to Scotland for her youngest daughter, Alexandrina Gunn, known as Ina, to come and live with her on the farm, and furnished the money for the necessary expenses of the trip. This daughter remained with the mother from the time of her arrival from Scotland until the mother's death, in January, 1904. In 1900 this daughter married Donald Robertson, and they remained with the mother as a part of her family.

At the time Ina came to Kansas she was about twenty-six years of age, and her mother was about seventy. After Mrs. Gunn's death Mrs. Robertson filed a claim against the estate for work and labor performed, a copy of which, without caption or verification, reads:

"Estate of Isabella Gunn, deceased, to Alexandrina Robertson, Dr.:

"To services in caring for deceased from July 1, 1895, to December 1, 1902, at three dollars, under

Griffith v. Robertson.

agreement to make a will providing for payment of full value of claimant's services, \$1158.

"To services for nursing deceased on sick-bed from December 1, 1902, to November 24, 1904, at ten dollars per week, under agreement that deceased would make a will and provide for payment at full value of services, \$1030.

"Total amount of claim, \$2188."

Mrs. Robertson claims that her mother agreed to give her the farm in payment for her services, and that it was the intention of Mrs. Gunn to make a will to that effect, but she postponed it from time to time until it was too late. In the absence of such a will she claims the reasonable value of the services. The plaintiff, being an incompetent witness as to any conversation or transaction had personally by her with her deceased mother, was compelled to rely upon other proof to establish her contract. This difficulty on the part of the plaintiff appears to have been the chief reliance of the defendant, and every possible phase of the question was vigorously contested.

Thirty-three assignments of error are presented to this court, nearly all of which involve some feature of the competency of the plaintiff's evidence. In addition to this it is urged that the plaintiff was permitted to introduce evidence which did not tend to establish the agreement set forth in the account.

For convenience we will consider the last objection first. In our view of the case there was but one serious question at issue, and that was whether the services of the plaintiff were rendered gratuitously. If the mother agreed to pay for them, and failed to do so, the manner in which she intended to make payment is only important as indicating that she did not think they were rendered gratuitously. The administrator claims that as the burden was upon the plaintiff to show that there was an express agreement to pay for the alleged services, and as she has stated the transaction in which such express contract was made, her

evidence must be confined to such transaction. As a question of pleading this is probably correct; but the informal and summary manner which the statutes provide for the disposition of this class of cases suggests the application of a liberal rule of construction, both to the statements of the account and to the admissibility of testimony in support thereof. Therefore, any evidence which tended to show that the mother agreed to pay the plaintiff for her services by the provisions of a will would be proper under the statements of her claim.

The plaintiff, as a witness in her own behalf, testified to several conversations between her mother and sister, which took place in the presence and hearing of the witness. This is the subject of vigorous complaint, on the ground: (1) That the witness is incompetent; and (2) that the evidence does not tend to sustain the account sued upon, which constitutes the plaintiff's pleading. The general scope of the evidence admitted over these objections will be seen by a few quotations therefrom:

"Ques. What was the conversation about, Mrs. Robertson? . . . Ans. She always told Mrs. Clark that after her death the land where she lived would be mine, if I stayed with her and took care of her until she died."

"Q. Now, you may tell what your mother said to Mrs. Clark about that. A. She always told she sent to Scotland and wanted to take me here to take care of her, and if I stayed here it was mine after her death."

"Q. Did you ever hear your mother say anything to Mrs. Clark about the farm you were living on? A. Yes, sir; that was all she had, and it was that that she was to leave me, if I stayed with her."

"Q. Go ahead. A. She told Mrs. Clark that I was n't satisfied to stay with her, but if I stayed with her until after her day, it would be mine—the farm that she was on."

"Q. Did you ever hear your mother say anything to Mrs. Clark about how she intended the farm to become yours? A. No, sir. She just said she was going

to fix it after her death to be mine, and that is all I ever heard her say. She would leave it."

"Q. Now, Mrs. Robertson, do you remember anything else that you heard your mother tell Mrs. Clark in regard to what she had told you? A. Nothing further than that; that the land would be mine after her death, if I stayed there and took care of her. She was going to fix it that way if she was able to get to Wellington here; that she was going to fix it that way."

This is only a small part of the entire evidence of this character admitted. Under the rule stated by this court in the cases of *McKean v. Massey*, 9 Kan. 600, *Jaquith v. Davidson*, 21 Kan. 341, and *McCartney v. Spencer, Ex'r*, 26 Kan. 62, this witness was competent to testify to a conversation had between her mother and another. The evidence itself is competent, as it tends to show that the mother had agreed to pay for the services of the plaintiff, and that such payment was to be made by the provisions of a will. (*Bonebrake v. Tauer*, 67 Kan. 827, 72 Pac. 521.)

Several neighbors testified to conversations had by them with the mother, in which she stated that she intended to send to Scotland for the plaintiff to come and live with her while she lived; and it is shown that she did send money to the plaintiff to pay the expenses of the latter's trip to Kansas. The mother also stated to several visiting neighbors that Ina was going to take care of her the rest of her life, and was to have the farm in payment therefor; and that she intended to fix it that way as soon as she was able to go to Wellington. She also remarked that they were lonesome there, living alone, and that Ina did not like to stay, but she would not leave—"she is a good, good girl, and will be paid well for her trouble." It also appears that the plaintiff's husband urged her to leave her mother and go with him to their own place, which she refused to do, and he went to it alone and remained apart from her much of the time during the last two years of the mother's life.

The rendition of the services by the plaintiff is not denied. That the mother intended to pay liberally therefor is clearly shown. The conclusion that the plaintiff at all times expected to be paid therefor is fully justified by the evidence. That there was an express contract between the mother and daughter is a fair deduction from the testimony. That the plaintiff was kind and careful of her mother's comfort during her illness is shown by the repeated statement of the mother that "Ina is a good, good girl." The fact that payment was to come after the mother's death, if the service continued to that time, and that an arrangement for this purpose was to be made when the mother went to Wellington, suggests that it was intended that payment would be provided for by the provisions of a will.

Under ordinary circumstances—that is, if no family relation existed—the law would imply a promise on the part of the deceased to pay for the services received. But in compliance with a wise and beneficent public policy, designed to protect and preserve the relations which belong to home and the family fireside, the law presumes all such services to have been rendered solely from considerations of filial affection and duty. This, however, like any other presumption of fact, may be overcome, and a contract, if any existed, may be established by any competent evidence. It is not essential that a formal offer and acceptance, in writing or otherwise, be shown. In the absence of more direct evidence the fact may be established by circumstances. An express contract exists whenever there is a mutual meeting of the minds upon any contractual proposition. The essential contractual proposition in this case is: Were the services in question to be paid for? What was the mutual understanding of these parties upon this subject? This was a proper question for a jury, and that tribunal has answered that the parties intended that the services should be paid for.

Many objections are made to the instructions of the court, both on account of those refused and those given. These are too numerous to discuss in detail. The principal contention of counsel may be shown by one instruction asked and refused which reads:

"Briefly stated, a contract can only be entered into when there are at least two competent contracting parties, and one or more definite propositions or offers are made by one for the acceptance of the other, and such propositions or offers are accepted by the other, absolutely as made, in such way that each knows the state of mind of the other on the offers."

The court's view of the law applicable to this case is shown by instructions given which read:

"(6) If you should find from the evidence, by a preponderance thereof, that the services claimed for, or any part thereof, were performed by the plaintiff for the deceased, upon an express contract that the same should be paid for, or with the understanding and agreement of both the plaintiff and the deceased that same should be paid for, then you should find for the plaintiff, and should allow her in your verdict the fair and reasonable value of such services as she so rendered at the time and place where rendered. Unless you so find you must find for the defendant."

"(9) It is not necessary that the plaintiff prove the exact words of the contract or agreement had between herself and her mother, if you find that she had an agreement with her mother; but in determining whether there was such an agreement you may take into consideration such evidence as has been given before you of the declarations and statements of the plaintiff's mother. If you find that she made such declarations and statements, and all the facts and circumstances surrounding the plaintiff and her mother, and if from these declarations and the facts and circumstances surrounding the parties you believe from a preponderance of the evidence that the plaintiff and her mother did have an agreement that the plaintiff should be compensated by her mother by making provision for her out of her estate, then your finding should be for the plaintiff.

"(10) If you find from a consideration of all the

evidence that there was a mutual understanding between plaintiff and her mother that the plaintiff should be compensated for working for her mother, and caring for her, and that she did the work and cared for her as she claims under such mutual understanding, then your finding should be for the plaintiff.

"(11) The plaintiff must recover in this action, if she recovers at all, on the agreement which she alleges she had with her mother; and the burden of proof is upon her to show by a preponderance of the evidence that she had a contract with her mother by which her mother was to pay her for her services, by making a provision for her to be paid out of her estate."

The court uses the words "understanding and agreement" as equivalent to "express agreement," and to this vigorous objection is made. We think the instruction requested requires a formality unnecessary in any case—one seldom observed between parent and child, and contains conditions not applicable to the evidence in this case. It was therefore properly rejected. As before stated, we think that a mutual meeting of the minds upon a matter of contract creates an express contract, whether evidenced by a formal offer and acceptance or otherwise. The case of *Ayres v. Hull*, 5 Kan. 419, is in many respects similar to this. In that case Chief Justice Kingman, in the following language, stated that a mere promise or understanding between the parties would be sufficient:

"For nearly eight years the defendant in error lived in the house and formed part of the household of the brother, rendering services, abundantly proved to have been valuable, and receiving in return but a scanty supply of clothing, a living, and a home. Had there really existed any contract, or promise, or understanding, between the parties, we would not disturb the judgment." (Page 424.)

Complaint is also made of instructions upon the amount of recovery. We think the criticism made here is due more to the condition of the proof than to the action of the court. The only evidence upon the subject of the value of the services shows the value

Griffith v. Robertson.

of the ordinary service of a servant-girl on a farm to be three dollars a week, and that of trained or partially trained nurses to be from ten dollars to fifteen dollars per week. The services embraced farm work, housekeeping, and nursing. The plaintiff was not a trained or experienced nurse, but gave all the care and attention to her mother possible, besides looking after every other matter about the place. The evidence upon this subject was all given by the plaintiff. From it the jury had to reach a conclusion as to the amount the plaintiff's labor was reasonably worth. The court directed them, in substance, to consider the evidence given, and any facts within common knowledge, and award such amount as to them seemed reasonable and just. We see no error in this. The court throughout its instructions repeatedly presented the idea that no recovery could be had unless an express contract be shown, and that the amount of recovery should be the reasonable value of the services rendered.

We have carefully examined all the instructions given and think that they fully and fairly presented the case. We are unable to find any error sufficient to reverse the judgment of the court, and it is therefore affirmed.

All the Justices concurring.

Campbell v. Faxon.

**JAMES A. CAMPBELL V. FRANK A. FAXON *et al.*,
as Partners, etc.**

No. 14,606. (85 Pac. 760.)

SYLLABUS BY THE COURT.

1. **CONTRACTS—Master and Servant—Termination by Death.** A contract that one party was to be the managing agent of a drug-store owned by another, which might be terminated at any time by either party, and in which it was agreed that instead of a salary the agent's compensation should depend upon the extent and success of the business, created a personal relation which was dissolved by the death of one of the parties, and was without binding effect upon the administrator of his estate.
2. **ADMINISTRATORS—Conducting Decedent's Business without Authority—Liability.** In the absence of a testamentary direction an administrator of the estate of a deceased person cannot carry on the business of the decedent, and if he does so without authority he will be individually bound for the contracts of the business.

Error from Doniphan district court; WILLIAM I. STUART, judge. Opinion filed May 12, 1906. Affirmed.

STATEMENT.

ACTION by the firm of Faxon, Horton & Gallagher to recover for drugs purchased for the "Elk Pharmacy," in Kansas City. C. F. McCormick owned a drug-store and employed R. E. Ela, jr., as his agent and manager of the store. A few months afterward McCormick died, and J. A. Campbell was appointed administrator of the estate. Campbell took possession of the drug-store, inventoried the stock, and agreed with Ela to continue the business upon the same plan as it had been conducted in McCormick's lifetime. The business was continued for about six months, during which time the goods in suit were purchased, but as it was not a success it was discontinued and the stock of drugs was sold to Mrs. McCormick. The written agreement

Campbell v. Faxon.

under which the store was managed by Ela prior to McCormick's death is as follows:

"Know all men by these presents, that R. E. Ela, jr., of Kansas City, Kan., party of the first part, and C. F. McCormick, of Kansas City, Mo., party of the second part, have entered into this agreement on the 1st day of February, 1903, witness as follows:

"That R. E. Ela, jr., party of the first part, and C. F. McCormick, party of the second part, have entered into a contract this 1st day of February, 1903, that R. E. Ela, jr., is to be the manager of said drug-store now owned by C. F. McCormick, located in Kansas City, Kan., on lot two (2), block three (3), No. 1932 Walnut Park addition. It is agreed between the parties that R. E. Ela, jr., is to be in full charge of the store and have full control of its management and to be its manager; and it is further agreed between the parties to this contract that C. F. McCormick is the sole owner and proprietor of all stock, merchandise, and fixtures in said store. It is further agreed between the party of the first part and the party of the second part that the stock of goods shall be kept up to the invoice price which the goods invoiced on or about the 1st of October, 1902; and it is further agreed that the amount of stock, including medicines, drugs, sundries, fixtures, other goods, and merchandise, shall always be equal and amount to invoice price which the goods invoiced on or about the first days of October, 1902. It is further agreed and consented on the part of R. E. Ela, jr., that he will put in all of his time, energy and efforts to control such business, and that he will not engage in any other business while this contract is in effect, but give his whole time and attention to the management of the store now subject of this contract.

"It is further agreed that R. E. Ela, jr., shall have full charge of said store, and that R. E. Ela, jr., of the first part, out of the proceeds of the business shall pay all expenses in operating the store, including light, fuel, water, and insurance. It is further agreed that R. E. Ela, jr., is to pay C. F. McCormick, party of the second part, eight per cent. per annum on five thousand (\$5000) dollars; to be paid on the 25th of each month. The first payment is to be paid February 25, 1903. The amount to be paid each month is thirty-three ($33\frac{1}{3}$) dollars, and the payment of thirty-three ($33\frac{1}{3}$) dollars is to be paid as long as this contract is in force.

Campbell v. Faxon.

R. E. Ela, jr., is to have all of the profits the store makes after paying the eight per cent. per annum monthly payments to C. F. McCormick, of the second part, and that the party of the first part shall draw no salary whatever.

"It is further agreed by and between the parties hereto that the party of the second part shall have the privilege and reserve the right to put an end to and terminate this contract any time if he believes the business is not running satisfactory. It is further agreed on the part of the party of the first part that the party of the second part [shall have] the right to sell, convey and dispose of this stock of merchandise at any time that he can secure a buyer for the same, and also and take immediate possession of said stock when he has found a buyer.

"It is further agreed by party of the second part that R. E. Ela, jr., is to have an option on buying said stock if it is to be sold or disposed of; option good for thirty days.

"It is further agreed between party of the first part and party of the second part that second [party] can make a weekly inspection of the books and examine the stock and demand an accounting at any time desired.

"It is further agreed that R. E. Ela, jr., party of the first part, and C. F. McCormick, party of the second part, that first party can terminate this contract at any time he desires.

"IN WITNESS WHEREOF, Parties hereto set their hands and affix their seal, on the day and year first above written.

R. E. ELA, JR.

C. F. McCORMICK."

The goods purchased of plaintiffs under the Campbell régime were not paid for, and hence this action was brought and a recovery had against Campbell.

Ryan & Ryan, for plaintiff in error.

Austin & Austin, Karnes, New & Krauthoff, and *C. W. Reeder*, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, C. J.: The material facts in the case are not in dispute, but there is a contention as to the relation of J. A. Campbell to the drug business and his lia-

Campbell v. Faxon.

bility for the contracts made while he was conducting it. These depend mainly upon the interpretation and obligation of the McCormick-Ela contract, under which Campbell continued the business. At an early stage of the litigation there appears to have been some claim that the contract created a partnership relation, but all parties now agree that McCormick and Ela were not partners, and Campbell therefore does not stand in such relation and cannot be held liable as a partner. He does contend that he was warranted in continuing the business, and that he did so without personal liability because Ela's contract did not terminate with McCormick's death.

It will be observed that it was a personal contract, which ended with the life of McCormick. It was expressly stipulated that McCormick should be the sole owner of both goods and fixtures, and, while Ela was given the management of the store, he was not to have any ownership or interest in it. Instead of receiving a fixed salary his compensation was to be regulated by the extent of the business done; that is, he was to receive as compensation all above a fixed amount of the earnings which was to be paid monthly to McCormick. Aside from this there was the specific provision that the contract could be terminated at any time by McCormick, and if McCormick was not bound to continue the relation with Ela it is certain that no obligation rested upon Campbell to do so. It is clear, therefore, that the contract was dissolved by the death of McCormick, and that it had no binding effect on Campbell. (*Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688; *Schultz & Co. v. Johnson's Ad'r*, 5 B. Mon. [Ky.] 497; *Dickinson v. Calahan's Administrators*, 19 Pa. St. 227; *Bland's Administrator v. Umstead*, 23 Pa. St. 316; 2 Woerner, Am. Law of Adm., 2d ed., § 328.)

When Campbell renewed the contract with Ela for a

continuance of the business he made himself individually liable for such obligations as his agent should contract. Upon his appointment as administrator the legal title of the stock of goods vested in him, and it became his duty to sell it and administer the proceeds as the statute provides. He had no authority to continue and carry on the drug business for the estate, and contracts made by him in the conduct of the business bind him personally, and not the estate. A representative expressly authorized by a will to carry on the business of the testator for a time may do so under the direction of the probate court. One so authorized is not bound to incur the hazard, but if he does the contracts made will be his own, and he will be individually bound by them. In volume 2 of the second edition of Woerner on the American Law of Administration, section 328, it is said:

“The executor carrying on the business under the will is personally liable to the persons with whom he deals as such, but they have a right to indemnify themselves for the payment of debts thereby incurred, and an equitable right arises to the trade creditors to resort to the estate, if their remedy against the executor is unavailable.”

Here there was no will, and the administrator's only duty with respect to the business was to wind it up. In volume 18 of the *Cyclopedia of Law and Procedure*, at page 241, it is said:

“The general rule is that neither an executor nor an administrator is justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys; and trading lies outside the scope of administrative functions. So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used, with interest, or at their election take all the profits which the repre-

sentative has made by such unauthorized use of the funds of the estate."

(See, also, *Willis et al. v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; *Lucht, Adm'r, v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; 1 Williams, Executors, 7th Am. ed., 791; Schouler's Ex. & Adm., 2d ed., § 325; 11 A. & E. Encycl. of L. 974.)

Ela was not employed by Campbell to wind up the business of the estate, but to carry it on in the same manner and upon the same plan in which it had been conducted during McCormick's lifetime. It was not carried on in pursuance of an order of the court or other authority, and hence Campbell took the risk of any loss that might occur, and made himself individually liable for the purchases of goods and other contracts made by his agent.

We find no error in the record, and therefore the judgment is affirmed.

All the Justices concurring.

E. J. WALTERS V. JULIA A. CHANCE *et al.*

No. 14,610. (85 Pac. 779.)

SYLLABUS BY THE COURT.

1. DEMURRER—*Departure in Pleading Not Reached.* Under our code a demurrer will not raise the question of inconsistency or departure in pleading.
2. EJECTMENT—*Defense*—"Mortgagee in Possession"—*Peaceable Entry.* A quiet and peaceable entry into possession of unoccupied land and the continued possession thereof by a mortgagee, after condition broken, is a complete defense to an action in ejectment by the owner, until the mortgage lien has been satisfied.

Error from Ness district court; CHARLES E. LOBDELL, judge. Opinion filed May 12, 1906. Reversed.

Wheeler & Switzer, for plaintiff in error.

N. A. Yeager, for defendants in error.

The opinion of the court was delivered by

GREENE, J.: This was an action in ejectment, commenced September 14, 1903, by the heirs of William Chance. The answer, while indefinite in its allegations, was an attempt to plead title and possession under a tax deed, and also possession under a past-due and unpaid mortgage. Upon motion the court required defendant to attach copies of these instruments, which was done by filing an amended answer. To this answer a demurrer was sustained, and upon leave being granted a second amended answer was filed, to which a demurrer was sustained and judgment rendered thereon for the plaintiffs. In the second amended answer the defendant relied wholly upon his rights as a mortgagee in possession.

The material allegations of this answer were that on April 1, 1886, William T. Tartar, being the owner of the land in controversy, executed a mortgage thereon for \$250, payable to Lew E. Darrow, due April 1, 1891; that the defendant was the owner of that mortgage; that it had not been paid; that on May 3, 1886, Tartar and wife conveyed the land to Alexander McCollum by warranty deed, and on September 3, 1887, McCollum conveyed the land by warranty deed to William Chance, who by a condition in the deed assumed and agreed to pay the mortgage; that on April 1, 1891, William Chance secured an extension of five years from that date for its payment; that for a long time prior to February 11, 1901, William Chance and his heirs had abandoned the land; that on the date last named the land was unoccupied; and that on that date defendant went into possession thereof under his mortgage, and has continued in the exclusive occupancy thereof ever since, claiming to be a mortgagee in possession.

The grounds of plaintiffs' demurrer to this second amended answer were: (1) That the first and second amended answers were inconsistent with, and a de-

parture from, the defense pleaded in the original answer; (2) that the second amended answer did not state a defense. We are not informed upon which of these grounds the demurrer was sustained, or that it was not sustained for both reasons.

Where a demurrer contains several grounds, and is sustained, it would be much better practice to make the record show upon what ground or grounds the order is made. It is not unusual in practice that only one of the grounds assigned in a demurrer is presented to the trial court, while any one of the other grounds may be relied upon in this court. It would be much fairer to the trial court and the parties, and would simplify the work of this court, if the grounds upon which the trial court relied were stated in the record. In the present case we must assume that the demurrer was sustained on the general ground of insufficiency of the answer, since a departure in pleading is not a ground of demurrer under our statute.

The answer stated that the taxes had been in default since 1893. It is contended that this allegation, coupled with a certain condition in the mortgage, matured the debt in 1893, and that, more than five years having elapsed before the filing of the answer, the defendant's cause of action was barred by the statute of limitations. The condition referred to reads:

"The said first parties agree to pay all taxes and assessments levied on said premises when the same are due, and if not so paid the holder of this mortgage may, without notice, declare the whole sum of money herein secured due and payable at once, or may elect to pay such taxes and assessments and be entitled to interest on the same at the rate of ten per cent. per annum until paid, and this mortgage shall stand as security for the amount so paid, with such interest; but whether the holder of this mortgage elect to pay such taxes and assessments or not, it is distinctly understood that the holder hereof may immediately cause the mortgage to be foreclosed and shall be entitled to immediate possession of the premises and the rents, issues and profits thereof."

If the question depended upon a construction of this provision alone we would hold that the statute did not commence to run until the holder of the mortgage declared the debt due. The holder of the note and mortgage might have declared the debt due and payable upon such default, but he was not compelled to do so, and until he exercised this right the statute of limitations would not start. Two things had to transpire in order to start the statute of limitations—first, a default in the payment of taxes; and second, a declaration of the holder of the mortgage that he had elected to take advantage of the default. That this is the correct construction of this provision is too apparent to become a subject of serious controversy, especially when read with the following condition in the note:

“If default be made in the payment of any interest notes or any portion thereof for the space of thirty days after the same becomes due and payable, or in the payment of any taxes assessed against the real estate mortgaged to secure this loan until the same shall have become delinquent, then all said principal and accrued interest shall, at the option of the legal holder of this bond, become due and payable without any notice of any kind whatsoever.”

And with the following in the mortgage:

“That said first parties agree that if the maker of said bond shall fail to pay any of said money, either principal or interest, within thirty days after the same becomes due, or to conform to or comply with any of the foregoing covenants, the whole sum of money herein secured may, at the option of the second party, or his assigns, and without notice, be declared due and payable.”

The amended answer stated the mode by which the defendant acquired possession to be as follows:

“This defendant further avers that for several years prior to the 11th day of February, 1901, the lands described in said petition and in said mortgage were vacant and unoccupied, and have been abandoned by the said William Chance and his heirs, and no taxes were

paid upon the same by any of the owners since 1893, and said lands were sold for the taxes of 1893.

"This defendant further avers that on the 11th day of February, 1901, being the owner and holder of the note and mortgage above referred to, and no part of the principal having been paid, and no part of the interest having been paid, in 1895, and believing that said lands had been abandoned by the owners, he went into the peaceable possession thereof for the purpose of better securing the indebtedness due him upon said note and mortgage, which were then a valid and subsisting lien upon the lands, prior and superior to all others, and that afterward he paid up all the taxes past due upon said real estate, and has since paid all taxes and assessments levied upon said lands as the same became due, said taxes so paid by him amounting to the sum of \$200; that ever since the 11th day of February, 1901, the defendant has been, and now is, in the actual and exclusive possession of said real estate as the mortgagee and owner and holder of said note and mortgage, claiming and now claims the right in said lands of a mortgagee in possession."

The defendants in error contend that before the holder of a mortgage can invoke the defense of a "mortgagee in possession," in an action of ejectment, he must show that he took possession under his mortgage with the consent of the owner of the land. They also contend that the answer shows that no such consent was obtained; that, therefore, the entry was unlawful; and that an equitable defense cannot be predicated upon an unlawful act. The decisions of this court, where the defense of a mortgagee in possession has been made, do not sustain the contention that the possession must have been acquired with the consent of the owner. In *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, the mortgagee got possession under a void foreclosure sale, and it was held that he was a mortgagee in possession. The facts in the case of *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396, were substantially the same, and it was again held that the mortgagee was entitled to the rights of a mortgagee

in possession. In *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, it was said that where the mortgaged land had been abandoned and the mortgagee had gone peaceably and quietly into possession, the owner could not maintain ejectment until he paid the mortgage lien, and that abandonment is an implied assent that the mortgagee may take possession under his mortgage. In *Cooke v. Cooper et al.*, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709, it was said:

"If he [the mortgagee] can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt." (Page 148.)

Whether the holder of a mortgage who is in possession is entitled to make the defense of a "mortgagee in possession," after condition broken, depends upon the equities of each case. No general rule applicable alike to all cases can be stated, except where the mortgagee enters under an express agreement with the owner. Of course, if he obtain possession by force, intimidation, deceit, or fraud, a court of equity will not permit him to profit thereby. But where, after condition broken, the land is unoccupied, and he enters peaceably, a court of equity will not eject him at the suit of the owner until his lien upon the land shall have been satisfied. / Such a rule does equity between the parties, and deprives the owner of the land of no rights. Mr. Justice Mason, speaking for the court in *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396, said:

"The expression frequently used, that the entry must be lawful, we interpret to mean not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right." (Page 145.)

Staley v. Hufford.

If, after condition broken, the premises are unoccupied, the mortgagee may, if he can do so peaceably, enter into the possession under his mortgage; and he cannot be ejected therefrom by the owner until his mortgage lien has been fully satisfied. The land in question had been sold and deeded for the taxes of 1893. The owners had paid no subsequent taxes. No interest had been paid on the mortgage debt after 1895. In February, 1901, the land was unoccupied and "abandoned," as stated by defendant in his answer. The mortgagee went quietly and peaceably into possession, under his mortgage, and continued therein without objection until this action was commenced—September, 1903. The facts pleaded are ample to sustain the defense of a mortgagee in possession. It was error therefore to sustain the demurrer.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

All the Justices concurring.

PORTER, J., not sitting.

73	686
81	252

C. G. STALEY V. J. H. HUFFORD *et al.*, as Partners, etc.

No. 14,614. (85 Pac. 763.)

SYLLABUS BY THE COURT.

AGENCY — *Commission for Sale of a Homestead — Refusal of Wife to Convey.* Where one employs a real-estate broker to find a buyer for land which he occupies with his wife as a homestead, and the broker produces a purchaser ready and willing to take the property upon the prescribed terms, the agent's claim for compensation is not defeated by the fact that a sale is prevented through the refusal of the wife to execute a conveyance.

Error from Allen district court; OSCAR FOUST, judge. Opinion filed May 12, 1906. Affirmed.

Chris Ritter, for plaintiff in error.

J. B. Atchison, for defendants in error.

The opinion of the court was delivered by

MASON, J.: C. G. Staley employed Hufford & Napier, real-estate agents, to sell for a stated price a tract of land, a part of which was occupied by himself and wife as a homestead, or to arrange a satisfactory exchange of this for other property. The agents found a buyer, one C. A. Martin, who was ready and willing to take the land upon terms that were satisfactory to Staley; and Staley and Martin signed a paper purporting to be a contract for its sale or exchange. Staley's wife did not execute this instrument or otherwise consent to the bargain. She refused to execute a deed, and the deal consequently fell through. Hufford & Napier sued Staley for a commission, and recovered a judgment, which it is the purpose of this proceeding to reverse.

The principal contention of the plaintiff in error is that inasmuch as the contract entered into by Staley and Martin was void for want of the consent of Mrs. Staley there could be no recovery for services in connection with it, *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431, being relied upon to support this view. The invalidity of that contract does not affect the matter. It was competent for Staley to employ Hufford & Napier to find a buyer for property which he had no power to convey, just as he might have employed them to get a bidder for property which he did not own but which he expected to be able to control. Having asked and received their services, no reason is apparent why he should not pay them therefor, they having done everything possible on their part, and their efforts to accomplish a sale having been rendered futile by the inability of Staley to procure a conveyance, which resulted from no fault of theirs. The purported contract signed by Staley and Martin is of no importance in the matter except as evidence that the terms of sale or exchange negotiated by Hufford & Napier in fact met the requirements of Staley, and therefore that the agents had performed the duty they had undertaken. The

The State v. Campbell.

case is within the reason of the rule that a real-estate broker's claim for commission is not defeated where a sale is prevented by the fault of his employer.

A letter written by the agents contained an expression to the effect that they expected no pay unless they made a trade. This did not alter the essential character of their contract with Staley, or affect the application of the rule referred to. (23 A. & E. Encycl. of L. 919, 920.)

Complaint is also made of the refusal of the court to permit the introduction of certain testimony, but the offer was made under such circumstances that it was clearly within the discretion of the court to refuse to consider it on account of the time of making it. The judgment is affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. FRANK M. CAMPBELL.

No. 14,688. (85 Pac. 784.)

SYLLABUS BY THE COURT.

1. **CRIMINAL LAW—*Right to Speedy Trial—Delay Occasioned by an Appeal.*** The terms of court which intervene pending an appeal by the state in a criminal action are not to be counted in determining whether a person under indictment and held to bail is entitled to be discharged under section 221 of the code of criminal procedure (Gen. Stat. 1901, § 5666) because not brought to trial before the end of the third term of court after indictment found or information filed.
2. ——— ***Confessions—Statements before a Grand Jury.*** Statements and declarations by a defendant in a criminal action in denial of guilt while a witness before a grand jury are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him.
3. ——— ***Testimony in Response to a Subpœna Not Involuntary—Waiver of Privilege.*** The fact that his testimony before

73	688
e73	738

73	688
176	450

73	688
d82	789

The State v. Campbell.

the grand jury was in obedience to a subpoena will not render such statements or declarations involuntary. His rights are protected by his privilege to refuse to answer when the answer tends to incriminate him; and by the failure to exercise his privilege in this respect his statements and declarations become voluntary.

4. ——— *Admissions—Voluntary Statements of an Exculpatory Nature.* Voluntary statements of fact made by a defendant in a criminal action, which do not tend to establish his guilt but which are exculpatory in their nature, are competent evidence against him as admissions of a party.
5. ——— *Grand Jurors—Disclosure of Evidence Given before Them.* The language of section 5535 of the General Statutes of 1901, providing that "no grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto," is not limited by the provisions of section 5533 of the General Statutes of 1901, permitting such evidence in certain cases.
6. ——— *When Proceedings of Grand Jury May be Proved.* The secrecy imposed by the common law and statutes upon the proceedings before a grand jury will not prevent the public or an individual from proving by members of the grand jury in a court of justice what passed before the grand jury, when, after the purpose of secrecy has been effected, such disclosure becomes necessary in the furtherance of justice or for the protection of public or individual rights.
7. **STATUTORY CONSTRUCTION—Statute Adopted from Another State.** The rule that where a statute is adopted from another state the adoption carries with it the construction placed thereon by the courts of that state is a general rule, to which there are exceptions. Where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was adopted is opposed to the weight of reason and authority, or against the general policy of our laws, such construction will not be followed.
8. **CRIMINAL LAW—Judgment Holding Indictment Sufficient—Law of the Case.** A former judgment of this court holding an indictment sufficient in substance is the law of the case. All questions in this case raised by the motion in arrest of judgment are controlled by the former decision in *The State v. Campbell*, 70 Kan. 899, 79 Pac. 1133.

The State v. Campbell.

9. **BRIBERY—Member of Board of Education—Letting of Contracts.** The board of education of a city of the first class is charged with the care and custody of school buildings. A member of such board who accepts money as a bribe to influence his opinion, judgment and action in favor of letting or causing to be let a contract for cleaning school buildings is guilty of bribery, under section 2212 of the General Statutes of 1901, notwithstanding the fact that the board had by resolution referred the matter of cleaning such buildings to the superintendent of buildings, who was an employee but not a member of the board, where it appeared that the member charged with the offense let the contract with the approval of the superintendent of buildings.
10. ——— **Proof of Intent with Which Money Was Received.** When the gravamen of the charge is the receiving of money as a bribe to influence the opinion, judgment and action of defendant as a member of such board in causing such contract to be let, testimony showing that the contractor who paid defendant the bribe soon afterward took a similar contract with an individual at a much lower price is material and competent evidence of the intent with which the money was received.
11. ——— **Check Cashed by Defendant Competent to Prove Receipt of Money.** In such a case, where defendant is shown to have cashed a check payable to his order for the amount he is charged with receiving, drawn by the person from whom it is charged he received the bribe, the check itself is competent evidence against him to establish the receipt of the money.
12. **CRIMINAL LAW—Calling Witnesses—Names Indorsed on Indictment.** In a criminal action the state is not obliged to place upon the stand every witness whose name is indorsed upon the indictment.
13. ——— **Defendant May Not Rely upon Witnesses Subpœnaed by State.** If the defendant desires to rely upon the attendance of witnesses under subpœna by the state, he may notify them and the court of such fact, or may cause them to be subpœnaed in his own behalf. He has no right to rely upon the attendance of a witness merely because the state may have caused a subpœna to issue for such witness.
14. ——— **Motion for New Trial—Misconduct of Prosecutor—Effect of Trial Court's Ruling.** Upon a motion for a new trial on the ground of alleged misconduct of the prosecuting attorney in his argument to the jury, affidavits in support thereof were contradicted by the affidavit of the prosecuting

The State v. Campbell.

attorney, raising an issue of fact as to what was said in the argument. The ruling of the trial court denying the motion for a new trial will be considered as a finding against the facts alleged in the motion.

Appeal from Wyandotte district court; J. MCCABE MOORE, judge. Opinion filed May 12, 1906. Affirmed.

STATEMENT.

At the June term of the district court of Wyandotte county appellant was convicted of the crime of accepting a bribe to influence his official action as a member of the board of education of Kansas City. He was sentenced to confinement in the state penitentiary for a period of not less than one or more than seven years. From the judgment he appeals.

The second count of the indictment upon which he was tried charges that appellant, while a member of the board of education of Kansas City, from the sixth ward of that city, and while acting in his capacity as a member of such board of education, and acting under and by virtue of his office as a member thereof, did make, cause and permit to be made a contract with one G. E. Gilhaus, whereby it was agreed that Gilhaus was to clean out a school building and remove the mud, filth and water therefrom, and should receive as compensation therefor the sum of thirty-five dollars per day for the time occupied in performing the work. The count continued:

"And on or about the — day of August, 1903, in the county of Wyandotte, state of Kansas, the said Frank M. Campbell did then and there unlawfully, feloniously, corruptly and wickedly receive and accept from the said G. E. Gilhaus a large sum of money, to wit, the sum of four hundred and twelve dollars (\$412), to the value of four hundred and twelve dollars (\$412), as a reward for having given the vote, opinion, judgment and action of the said Frank M. Campbell in favor of letting and causing to be let to the said G. E. Gilhaus the said contract, and as a reward and bribe for having wrongfully and unlawfully

permitted and caused to be let to the said G. E. Gilhaus the said contract so as aforesaid set forth."

When the Kaw river flood of 1903 subsided the lower floors of the school buildings in the Armourdale district were filled with mud and filth to the depth of eighteen inches. Appellant was a member of the board of education, consisting of six members. At a meeting of the board the matter of arranging for the cleaning of these buildings was referred to the superintendent of buildings, one Biscomb, who was not a member of the board. Afterward Biscomb consulted and acted with appellant and C. M. Bowles, another member of the board, in reference to the work and in letting the contract. Appellant lived in the flooded district, and by consent of Biscomb and Bowles took the lead in making arrangements for having the work done. He saw G. E. Gilhaus, who was engaged, under the style of the Gilhaus Manufacturing Company, in doing similar work, and arranged with him to pump out these buildings, at a price agreed upon of thirty-five dollars per day for whatever time was required to do the work. Appellant introduced Gilhaus to Biscomb the day that the work of pumping was begun, and after the buildings were cleaned took the bill of the Gilhaus Manufacturing Company for the work to Biscomb to have the latter certify to it. With some changes the bill was certified by Biscomb, and, on August 3, allowed by the board, and a warrant was drawn for \$988.75, payable to the company. It is not shown what date the warrant was received by Gilhaus, but it appears to have been paid some days after its date. On the 11th of August Gilhaus gave to appellant the check of the Gilhaus Manufacturing Company for \$412, and on the same day appellant cashed it at the bank upon which it was drawn.

It appeared from the testimony of one witness that some time after the work at the school buildings was completed Gilhaus removed the mud and filth from a

The State v. Campbell.

building in the flooded district belonging to the witness, and that the price agreed upon was \$7.45 per day.

It was claimed by appellant that the personal transaction with Gilhaus had no connection with the contract for cleaning the school buildings; that the \$412 was in payment for a certain steam valve sold by appellant to Gilhaus after the work in the school buildings had been begun. He claimed that he had, some five years before then, invented the steam valve, and had applied for a patent on it, but the patent had never been granted through delays, and that he sold to Gilhaus the valve and the right to use and manufacture it.

C. C. Coleman, attorney-general, for The State.

Hale & Maher, for appellant.

The opinion of the court was delivered by

PORTER, J.: The appellant contends that the trial court erred in refusing to discharge him, for the reason that more than three terms of court had elapsed since the indictment was filed. The grand jury returned the indictment on January 25, 1904. At the next regular term of the court, which was the March term, appellant's motion to quash the indictment was allowed. The state appealed from that decision, and, on February 11, 1905, the judgment of the court was reversed, and the cause remanded for another trial. (*The State v. Campbell*, 70 Kan. 899, 79 Pac. 1133.) By section 5666 of the General Statutes of 1901 it is provided as follows:

"If any person under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to such offense, unless the delay happen on his application or be occasioned by the want of time to try such cause at such third term."

The State v. Campbell.

By section 5665 it is provided that if the person indicted be committed to prison and not brought to trial before the end of the second term after the indictment is filed he shall be discharged. The appellant here was admitted to bail immediately after his arrest, and therefore his case falls under section 5666, *supra*. Counsel for the state contends that, the delay having been caused by the erroneous ruling of the district court upon appellant's motion to quash, appellant was himself responsible for it, and it comes within the exception in the statute as one which happened on his application. On the other hand it is argued: (1) That the delay was the result of the state's appeal, not caused by any act of appellant; (2) that the statute having excepted certain delays, all others not mentioned are necessarily excluded.

It is proper here to refer to the history of the statute insuring to a person indicted and imprisoned or held to bail a speedy trial. By considering the evil sought to be remedied we are better enabled to construe the statute. When it was enacted it followed in general terms the provisions of similar statutes in the older states; and in them the evil sought to be remedied was one which the English people had struggled against since before the days of magna charta and the petition of right. It recalls the days of tyranny and despotism, when men were allowed to lie in dungeons for long periods without even an opportunity to know the nature of the charge against them. A speedy trial for all accused persons was one of the things insisted upon by the people of England in the first bill of rights, and English laws have jealously guarded the right from that time. It is provided for in the first ten commandments of the federal constitution, being embodied in the sixth of the ten amendments submitted by the first congress. The guaranty of the federal constitution, however, has been held not to apply to acts of the legislatures of the several states or to state courts.

The State v. Campbell.

(*Fox v. The State of Ohio*, 46 U. S. 410, 12 L. Ed. 213; *Murphy v. The People*, 2 Cow. [N. Y.] 815.)

The same provision or one similar is found in the constitutions of most of the states. It is a part of section 10 of our bill of rights. (Gen. Stat. 1901, § 92.) The statute is for the purpose of carrying into effect this provision of the constitution. It was never intended to apply to the facts in a case like the one at bar. Here there was no laches or delay on the part of the state, within the spirit and intention of the statute. The state was doing all within its power to bring the appellant to a speedy trial. A trial was begun, a motion to quash allowed, and the state appealed. This statute must be construed with the one giving to the state the right to appeal from a judgment allowing a motion to quash the indictment. (Crim. Code, § 283; Gen. Stat. 1901, § 5721.) To hold as appellant contends would deny to the state all benefit of the appeal, which the statute expressly gives. This cannot be the law. The appeal deprived the trial court of power to proceed further until it was determined, and in effect it held in abeyance the provisions of section 5666. Even though appellant had been in prison, unable to furnish bail, while the appeal was undetermined, his right to a speedy trial under this section would have been in no manner infringed.

In *People v. Giesea*, 63 Cal. 345, the same question arose, and the supreme court reversed an order discharging the prisoner. The court said:

"We are of opinion that the case of the defendant does not come within the provisions of the section above referred to. That section has no application where the prisoner has demurred to the indictment, the demurrer sustained, the effect of which ruling had to be gotten rid of by an appeal." (Page 346.)

(See, also, *Marzen v. The People*, 190 Ill. 81, 60 N. E. 102; *People v. Lundin*, 120 Cal. 308, 52 Pac. 807; *Patterson v. State*, 50 N. J. Law, 421, 14 Atl. 125; *State v. Conrow*, 13 Mont. 552, 35 Pac. 240.)

It is claimed that the court erred in allowing members of the grand jury which indicted appellant to testify to statements made by him while a witness before the grand jury. It is contended (1) that before such testimony was competent the state should have shown that the statements of appellant were voluntary, and (2) that members of a grand jury are prohibited by statute from testifying as to what a witness before that body has sworn to, except for the purpose of impeaching his statements made in court or in a case where the witness is being prosecuted for perjury.

In its testimony in chief the state introduced four members of the grand jury which returned the indictment, and proved by them certain statements made by appellant while a witness before the grand jury. These statements were to the effect that appellant made the contract with Gilhaus; that the \$412 was paid to him for the steam valve sold to Gilhaus after the contract was made for cleaning the school buildings; that he had invented the valve; and further statements in reference to his efforts to procure letters patent for it, his account of the loss of certain correspondence with his patent attorneys, and as to his procuring from Gilhaus the valve to be used in his defense against the charges made. When this evidence was offered counsel for appellant objected, and the following took place:

Ques. "What did Mr. Campbell say in his examination before the grand jury as to who had employed Mr. Gilhaus?"

Mr. Wooley: "I object to that as incompetent; testimony taken before the grand jury cannot be reiterated by the grand juror. They are attempting to make out their case in chief by hearsay testimony, taken before the grand jury in an *ex parte* proceeding."

The court: "Of course statements by a defendant are different from statements by other witnesses. Was that voluntary testimony, or was he compelled to go there; that might make a difference?"

Mr. Wooley: "He was brought there by subpoena."

Mr. Coleman: "I do not think there is anything in

The State v. Campbell.

the objection. The witness comes before the grand jury, and he is there as a witness generally in the investigation of violations of the law. He is supposed to tell the truth."

Mr. Wooley: "No proper foundation is laid here for the introduction of testimony of a grand juror. It is incompetent, at least at this time."

Mr. Coleman: "It is competent as an admission, if it amounts to one."

The court: "It may have been voluntarily made, and competent, if shown they are not made under compulsion. He may answer."

Another objection was made, as follows:

Mr. Wooley: "Objected to as incompetent for the jurors to disclose what was said in the grand-jury room; and for the further reason, he says his memory is refreshed by reading notes taken by some one else, and not by some notes he made himself."

These objections can hardly be said to raise the points now urged by appellant, but we prefer to consider them as if they did. Counsel for appellant urge, first, that before this evidence was competent the state must have shown that "the confession, admission or declaration, it matters not what the statements are called, were voluntarily made or given." It is insisted that the same rule applies to the admissibility of statements and declarations of a defendant in a criminal action that obtains in reference to a confession. The distinction between a confession and a statement or declaration is one recognized by the courts and text-writers, because it is a patent distinction in the very nature of things. The only reason why confessions are sometimes not admitted in evidence is because experience has shown that when made under certain circumstances they cannot be relied upon as true. It is not out of any consideration for the rights of the party alleged to have made the confession that it is excluded, but simply because of the inherent probability of its untruthfulness unless it first appears to have been made voluntarily, and not under the influence of fear

or duress occasioned by threats or hope of immunity by reason of promises.

"A 'confession,' in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred." (*State v. Reinhart*, 26 Ore. 466, 477, 38 Pac. 822.)

In the case of *State v. Gilman*, 51 Me. 206, it was said:

"The declarations of accused persons are not necessarily *confessions*, but generally, on the other hand, they are denials of guilt, and consist in attempts to explain circumstances calculated to excite suspicion." (Page 225.)

In volume 1 of Wigmore on Evidence, section 821, the author says:

" . . . (3) An acknowledgment of a *subordinate fact, not directly involving guilt*, or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions."

"When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession." (*Covington v. The State of Georgia*, 79 Ga. 687, 690, 7 S. E. 153.)

"A confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred." (*The State v. Red*, 53 Iowa, 69, 74, 4 N. W. 831.)

One of the early cases in point is *Hendrickson v. The People*, 10 N. Y. 13, 61 Am. Dec. 721. The ap-

The State v. Campbell.

pellant was charged with murder. His testimony given before a coroner's inquest previous to his arrest was held to be competent against him. The court there said:

"His statement as a witness was in no respect an admission of guilt. On the contrary, it was a denial of material facts attempted, on his trial, to be established by other witnesses. His testimony was calculated to ward off suspicion from himself, not to attract it toward him." (Page 22.)

It also held:

"The general rule is, that all a party has said, which is relevant to the questions involved in the trial, is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary, because obtained compulsorily or by improper influence." (Page 21.)

On the competency of a defendant's admissions generally, see *The State v. Inman*, 70 Kan. 894, 79 Pac. 162. The question whether the statement is voluntary or an involuntary one does not depend upon the fact of the witness's being under a subpœna. (*The State v. Finch*, 71 Kan. 793, 81 Pac. 494.) He may protect himself, if he sees fit, by refusing to answer because the answer tends to incriminate him. (1 Greenl. Ev., 16th ed., § 225.)

In the case of *The State v. Finch*, *supra*, appellant was charged with manslaughter, and his testimony given at the coroner's inquest in pursuance to a subpœna was held admissible. In that case, as in this, appellant relied upon some expressions in *The State v. Taylor*, 36 Kan. 329, 13 Pac. 550, and the court said: "But that case [*The State v. Taylor*] is not an authority that testimony given under a subpœna and without compulsion and duress is inadmissible." (Page 798.)

The case of *State v. Broughton*, 7 Ired. Law (N. C.) 96, 45 Am. Dec. 507, is a leading one which is in point.

The State v. Campbell.

The person on trial had testified before the grand jury that indicted him, and his statements before the jury were held admissible. It was there said:

"The counsel for the prisoner took the further ground here, that it was incompetent to prove the evidence of the prisoner, because it was in the nature of a confession, which, compelled by an oath, was not voluntary. It is certainly no objection to the evidence, merely, that the statement of the prisoner was given by him as a witness under oath. He might have refused to answer questions, when he could not do so without criminating himself; and the very ground of that rule of law is, that his answers are deemed voluntary and may be used afterward to criminate or charge him in another proceeding, and such is clearly the law. . . . But it is altogether a mistake to call this evidence of a confession by the prisoner. It has nothing of that character. It was not an admission of his own guilt, but, on the contrary, an accusation of another person. That it was preferred on oath in no way detracts from the inference that may be drawn from it unfavorably to the prisoner, as being a false accusation against another, and thus furnishing, with other things, an argument of his own guilt. There was, in our opinion, no error in receiving the evidence." (Pages 100, 101.)

In *Hendrickson v. The People*, 10 N. Y. 13, 61 Am. Dec. 721, it was said:

"It is now regarded as a well-settled rule, and recognized in the elementary books, that where a witness answers questions upon examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes. . . . Such answers are deemed voluntary, because the witness may refuse to answer any question tending to criminate him. . . . Independent of any supposed authority, I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate or a grand jury, could be rejected." (Pages 27, 29.)

In the celebrated case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, defendant at-

tended the inquest in obedience to a subpoena and testified under a threat of punishment for contempt if he refused. His testimony was held admissible notwithstanding he was not advised of his rights when it was given, it being shown that he was not under arrest or formally accused of the crime. The court in the opinion said:

"The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. This the defendant could have done had he chosen to claim his privilege. Having failed to do so he cannot now complain." (Page 333.)

"A confession receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt, and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt." (*Taylor v. State*, 37 Neb. 788, 56 N. W. 623, syllabus.)

To the same effect see *The People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *Wilson v. The State*, 110 Ala. 1, 20 South. 415, 55 Am. St. Rep. 17; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Parton*, 49 Cal. 632.

Tested by these well-established rules, how can it be said that the statements of appellant before the grand jury amounted to a confession? They were made in positive denial of guilt, and for the purpose of exculpating himself. He admitted the making of the contract with Gilhaus; there was no guilt, no crime, no offense in that. He admitted the receipt of \$412 from Gilhaus, but if the story he told was true, and this money was in payment of the purchase-price of the steam valve which he had sold to Gilhaus, there was no offense in that. No statement by itself amounted to an acknowledgment of guilt; nor could his guilt be necessarily inferred by the jury from all his statements taken together.

The State v. Campbell.

The constitutional right which every man has to refuse to answer any question that may incriminate him seems, in these days of "immunity pleas," to be fully recognized and appreciated. It furnishes ample protection, and does not, in our opinion, require reenforcement by the adoption of the rule contended for by the appellant.

The second ground upon which it is contended that this testimony was incompetent is that the statutory as well as the common-law rules prohibit a grand juror from disclosing the testimony of a witness before that body, except for two purposes: (1) To prove whether the testimony of such witness before the grand jury is consistent with or different from his testimony before the court; (2) upon a complaint against such person for perjury, or upon his trial for that offense.

Section 91 of the code of criminal procedure (Gen. Stat. 1901, § 5533) reads as follows:

"Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offense."

Section 93 of the code of criminal procedure (Gen. Stat. 1901, § 5535) is as follows:

"No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a misdemeanor."

These sections first appear in our statutes in the Laws of 1855 (Stat. Kan. Ter. 1855, ch. 129, art. 3, §§ 15, 17), and have been subsequently reenacted without

The State v. Campbell.

change. It is historical that the territorial legislature of 1855, often referred to as the "bogus legislature," adopted the entire statutes of Missouri, substituting the word "territory" for "state," and making some other slight changes where it was found necessary. These sections had been construed by the supreme court of Missouri in the case of *Tindle v. Nichols*, 20 Mo. 326, decided in January, 1855, and it is now contended that we are bound by the judicial construction placed thereon. In the *Tindle* case, which was an action for slander, defendant justified, and answered that plaintiff had sworn falsely in a certain matter before the grand jury. On the trial defendant sought to prove by members of the grand jury what the witness had testified. The court held that inasmuch as section 91 (Gen. Stat. 1901, § 5533) specified two classes of cases in which a grand juror may be required to disclose such testimony, it followed that all other cases not enumerated were excluded, and that the words of section 93 (Gen. Stat. 1901, § 5535), "when lawfully required to testify as a witness in relation thereto," had reference only to those two exceptions.

We recognize the force of the rule that where one state adopts a statute from another state it adopts the construction placed thereon by the courts of that state. But this is a general rule, to which there are numerous exceptions. It is not an absolute rule. In *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947, it was said:

"It is a general, though not a binding, rule of statutory construction, that where the provisions of a statute have received judicial construction in one state, and it is then adopted in another state, it is adopted with the construction so given it." (Syllabus.)

(See, also, *Davis Iron Wks. Co. v. White*, 31 Colo. 82, 71 Pac. 384; *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568.)

Endlich on the Interpretation of Statutes, section 371, says:

"Whilst admitting that the construction put upon such statutes by the courts of the state from which

The State v. Campbell.

they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice."

"Thus it has been held that the presumption will not be indulged where other jurisdictions having the identical or substantially the same provision had, almost without exception, given to the language a different construction long prior to the adoption in question." (26 A. & E. Encycl. of L. 703.)

It has been held that where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was taken is contrary to the weight of authority, the decision is not binding. In *Coad v. Cowhick et al.*, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953, the court, construing a statute adopted from Ohio, refused to follow a decision of the latter court holding a judgment not a lien upon after-acquired lands of the judgment debtor. The reasons stated by the Wyoming court were that the statute under consideration was not peculiar to Ohio, as other states had similar provisions, using the identical words or language the same in substance, and because it considered the decision of the Ohio court to be opposed to the best reasoning and the weight of authority. In volume 3 of Current Law, page 739, it is said:

"A statute copied from a similar statute of another state is presumed to be adopted with the construction

The State v. Campbell.

it had already received. The presumption, however, is not conclusive, and where the same provision exists in several states, there is no presumption that the construction of any particular state was in view."

The question before us, however, is not whether this statute was in fact adopted from Missouri, about which there can be no dispute, but whether we should be bound by the Missouri court's interpretation of it. To regard ourselves as bound absolutely by that construction would give it greater weight than if it had been the decision of this court originally, in which case the right and duty of this court to disregard it would not be denied, if upon reexamination it should be found opposed to the better reasoning, in conflict with the great weight of authority, or not in harmony with the spirit and policy of our laws.

The exact question decided in the Tindle case (*Tindle v. Nichols*, 20 Mo. 326) has been the subject of much discussion by the courts. In some of the states there are no statutory prohibitions, and the decisions are placed upon the reasoning deduced from common-law principles; and in some cases it is made to turn upon the peculiar oath required of grand jurors by the statutes. In many of the states the subject is controlled by statute, and provisions almost identical with our statutes are in force. The various statutory provisions of the several states are set forth in a note to section 2360 of volume 4 of Wigmore on Evidence.

From the time the grand jury was first established the law has surrounded its deliberations and all that transpired before it with secrecy. By the common law a grand jury was not permitted to disclose how any witness testified before that body or how any member voted. (12 Viner's Abr. 20.) The grand juror's oath required him to keep the state's counsel, his own and his fellows' secret. The purpose of this requirement has been manifestly, first, to protect the interests of the state by preventing information reaching the accused which might enable him to escape, or induce him

The State v. Campbell.

to suborn witnesses to prove the contrary of the charges; second, to protect the members of the grand jury, and leave them free to act without fear of consequences to themselves; and, third, to protect witnesses in the same way. Gradually exceptions to these rules have been allowed, and the first naturally to suggest themselves were those permitting a grand juror to testify what a witness swore to before the grand jury in a prosecution of the witness for perjury, and, again, for the purpose of impeaching the testimony of the witness on a trial of an indictment or in another action. The tendency of modern authorities has been to hold that when the reasons for secrecy no longer exist the ancient rules with reference thereto do not apply, and, in all cases where justice or the rights of the public require it, the facts should be disclosed.

"It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand-jury room; but it is now held that such disclosure, wherever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required." (Whart. Crim. Ev. § 510.)

"It is equally clear that the jurors were competent witnesses. In *Haak v. Breidenback*, and *Leonard v. Leonard* [1 W. & S. 342], *supra*, the parol evidence was given by jurors, and in the latter case under a special objection and exception; yet the judgment was reversed for the rejection of the evidence. There is no principle of law or rule of policy which in such a case ought to exclude them. It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows." (*Follansbee v. Walker*, 74 Pa. St. 306, 310.)

In *Commonwealth v. Mead*, 78 Mass. 167, 71 Am. Dec. 741, it was said: "But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end." (Page 170.) Mr. Wigmore, in volume 4 of his work on Evidence, section 2362, says: "But what are the limits of this

The State v. Campbell.

temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused." In note 6 to the next section, in referring to *Tindle v. Nichols*, 20 Mo. 326, the author characterizes the decision as "clearly unsound, as well as unjust."

The Florida supreme court in a well-considered case (*Jenkins, McRae and Clinton v. The State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267), decided in 1895, construed a statute which is in the same language as ours so far as section 93 (Gen. Stat. 1901, § 5535) is concerned. The court held that the provision of the Florida statute permitting a member of the grand jury to testify in the two special cases does not exclude an inquiry in other cases sanctioned by law, when in the discretion of the court it becomes proper to open up such inquiry. The *Tindle* case is cited, and the court comments upon the absence in their statute of the provision of the Missouri statute which prohibits a member of the grand jury from disclosing any evidence given before the grand jury "except when lawfully required to testify as a witness in relation thereto," but it is apparent that the same result would have been reached if the Florida statute had contained this provision. The *Tindle* case rests upon the theory that the first section specifies two cases, and that "the bare specification excludes all other cases not enumerated." (Page 328.) The Florida statute, likewise, specifies these same two cases, yet that court refuses to restrict the operation of the statute so as to exclude other cases not mentioned. They said:

"But independent of statutory regulation, it has long been established that it is discretionary with the trial court to permit a grand juror to be examined as to what a witness testified to before the grand jury, when competent and the ends of justice require it, and we do not see that our statutes have changed this rule." (Page 810.)

In *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157, the

appellant was charged with murder. Over his objection a member of the grand jury was permitted to testify to appellant's testimony before the grand jury. The same statute, substantially, as ours was construed, and in addition a statute prescribing a form of oath for the members of the grand jury, which latter provision, it was claimed, added to the inadmissibility of the evidence. It was held:

"The oath of grand jurors that they will not disclose the proceedings given before them does not prevent them from testifying in court as to such proceedings.

"Section 1731, Burns's R. S. 1894 (1662, R. S. 1881), providing that a member of a grand jury may be required to disclose the testimony of a witness examined before the grand jury, 'for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony upon his trial therefor,' does not limit the right to require grand jurors to testify to the two cases specified." (Syllabus.)

It should be noticed, perhaps, that the form of the grand juror's oath provided by our statute is silent with respect to keeping anything secret. In the case of *United States v. Negro Charles*, 2 Cranch, C. C. 76, 25 Fed. Cas., p. 409 (No. 14,786), it was said:

"Grand jurors may testify as to the confessions made by the prisoner before them, upon oath, when under examination as a witness against another person." (Syllabus.)

"The oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of the jurors, in a court of justice, what passed before the grand jury." (*Burnham v. Hatfield*, 5 Blackf. [Ind.] 21, syllabus.)

"The fact that a witness testified before the grand jury, together with his testimony delivered there, may, when otherwise competent, be proved in the trial of an action, when such evidence is required for the purposes of public justice, or the establishment of public rights." (*Hunter v. Randall*, 69 Me. 183, syllabus.)

The Oregon statute is substantially the same as ours. In *State of Oregon v. Moran*, 15 Ore. 262, 14 Pac. 419, the court said:

"The policy of the law generally is that the proceedings before the grand jury are secret. The reasons for this secrecy are many and obvious. It assists them in discharging their important duties; they are not troubled with any questions by the interested or curious; the means and sources of their information are not made public until the trial of the accused, and in many cases the guilty may not know that he is even suspected of crime until he is in custody. But there are cases in which the court is authorized to remove this secrecy, and to require the proceedings before the grand jury to be disclosed.

"It is provided by section 58 of the code of criminal procedure that a member of a grand jury may be required by any court to disclose the testimony of a witness examined before such grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before such grand jury by any person upon a charge against such person for perjury, or upon his trial therefor. . . . It may be conceded that the authorities cited from Missouri and Minnesota are opposed to this view; but it seems clear to us that they are at variance with the great weight of authority on this subject, and, in addition to that, they rest upon a narrow and technical construction of the statutes of those states. The court, therefore, did not err in allowing the grand juror Severson to disclose Moran's testimony before that body." (Pages 273, 274.)

"Upon the trial the defendant offered to prove by a member of a previous grand jury some admissions respecting the cause of action, made by the plaintiff on his examination before the grand jury. The evidence was objected to, and the objection sustained." (*Burnham v. Hatfield*, 5 Blackf. [Ind.] 21.)

"It seems not to be contrary to the policy of the law to allow disclosures by them [the grand jury] of what has been testified to before them, when they are called upon as witnesses in court to speak in relation thereto; but to permit it or not is in the discretion of the court, according to the time and circumstances of each

case. (*Sands v. Robison*, 20 Miss. 704, syllabus, 51 Am. Dec. 132.)

"Where these reasons have ceased to operate, it is the better opinion, contrary perhaps to some cases, but maintained in most, that any revelations of the grand jury's doings which justice demands may be made. The witness may be the prosecuting attorney or a third person present, a grand juror himself, or one who gave evidence before the grand jury, who may be even required to state what his own testimony was." (1 Bish. New Crim. Proc. § 857.)

Mr. Wigmore, after referring to and criticizing the Missouri and Connecticut cases, says:

"There remain, therefore, on principle, no cases at all in which, after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally accepted to-day. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required 'whenever it becomes necessary in the course of justice.' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle." (4 Wig. Ev. § 2362.)

The same author disposes of the notion that the two exceptions contained in many statutes should be held to exclude all others. He says:

"It is now universally conceded that a witness may be impeached, in any subsequent trial, civil or criminal, by self-contradictory testimony given by him before the grand jury. In the same way, a party to the cause, not taking the stand as a witness, may be impeached by his *admissions* made in testifying before the grand jury. The occasional statutory sanction for the former of these uses cannot be construed to prohibit the latter, which goes upon the same reasoning. Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed by the statutory omission to mention them—else the integrity of common-law principles would tend to be diminished in direct ratio to the ignorance or unskilfulness of the legislature which attempted in any respect to make a declaratory statute." (4 Wig. Ev. § 2363.)

Appellant, in addition to the Missouri cases, relies upon the old case of *The State v. Fasset*, 16 Conn. 457, which is a leading authority in support of the rule excluding such testimony. This case was decided in 1844, and has been to some extent discredited by that court in the case of *State v. Coffee*, 56 Conn. 399, 16 Atl. 151, decided in 1888. In the later case the court used this language:

"Some of the reasons given for keeping the testimony secret are temporary in their nature, and some do not exist under our practice where the prisoner is before the grand jury; nevertheless the oath and the policy of the law have ever regarded the testimony as among the secrets of the grand-jury room. Not, however, inflexibly so. In *State v. Fasset*, 16 Conn. 457, the court notices two exceptions—in prosecutions for perjury, and in case witnesses testify differently on the trial. Perhaps it would be proper to say that the oath has this implied qualification, that the testimony is to be kept secret unless a disclosure is required in some legal proceeding. It does not seem that the policy of the law should require it to be kept secret at the expense of justice. And so the weight of authority outside of this state seems to be, that where public justice or the rights of parties require it, the testimony before the grand jury may be shown. . . . We make these quotations, not for the purpose of showing what the law is in this state, but for the purpose of showing the principles which prevail in other jurisdictions. The case of *State v. Fasset*, *supra*, may be regarded as somewhat inconsistent with the broad principles elsewhere enunciated. It is doubtful whether the court intended to go further than the two exceptions there noticed." (Pages 410, 412.)

In an early Maine case cited by appellant (*McLellan v. Richardson*, 13 Me. 82) the testimony was held inadmissible because in conflict with the policy of the law and with the grand juror's oath, but in *State v. Benner*, 64 Me. 267, 285, the contrary was held, and this language used: "So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses."

In the case of *The State v. Gibbs*, 39 Iowa, 318, cited by appellant, a different question was involved. It was sought by defendant to impeach the action of the grand jury by presenting affidavits of several members for the purpose of showing that the indictment had not been concurred in by the requisite number of jurors. It is a universal rule that the evidence of members of the grand jury is not competent to impeach their action. (1 Bish. New Crim. Proc. § 858.) The same rule applies to the verdict of a petit juror. It is true the Iowa court in the opinion refers to the statutory and common-law rules enjoining strict secrecy upon the proceedings before a grand jury, and lays down the same rule as to the admissibility of testimony of its members as in the *Tindle* case, *supra*. However, in the case of *Steele-Smith Gro. Co. v. Pott-hast*, 109 Iowa, 413, 80 N. W. 517, a party's admissions before a grand jury were held to be competent evidence against him. In that case the evidence of his admissions was in the minutes of the testimony taken by the clerk of the grand jury, and the court said: "We know of no rule that would restrict the use of such minutes to cases of perjury." (Page 417.) No reference was made to *The State v. Gibbs*, *supra*.

Another case upon which appellant relies is the case of *Gutgesell v. State*, (Tex. Cr.) 43 S. W. 1016, in which the court of appeals of Texas held that such testimony was incompetent. It was declared to be against the policy of the law of that state, as appeared by the oath required of grand jurors and the statute authorizing a disclosure in the two classes of cases, and that the statute excludes any other exceptions. In *Wisdom v. The State*, 42 Tex. Cr. 579, 61 S. W. 926, a different view was taken, and the language of the former case was criticized.

It appears beyond question, we think, that the doctrine of the *Tindle* case, *supra*, is opposed to the weight of modern authority, and as its reasoning does

The State v. Campbell.

not accord with our views we must decline to be bound by it. The oath provided for grand jurors by our state imposes none of the common-law restrictions of secrecy required by the statutes of many of the states. While the obligations of the oath are by many of the courts considered indicative of the policy of the law in those states, the absence of any such requirements in the oath provided by our statute is perhaps of little importance, in view of the other obligations as to secrecy imposed by the sections which we are considering. In principle we see no good reason why the statements, admissions or declarations made by a witness before a grand jury should not be disclosed by a member of the grand jury whenever lawfully required to do so, or why a member of the grand jury may not be lawfully required to testify "in relation thereto" when, after the purpose of secrecy has been effected, it becomes necessary in furtherance of justice or for the protection of public or individual rights. To the same effect see the following cases: *Simms v. The State*—*Loyd v. The State*, 60 Ga. 145; *State v. Broughton*, 7 Ired. Law (N. C.) 96, 45 Am. Dec. 507; *People v. Young*, 31 Cal. 563; *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *People v. Reggel*, 8 Utah, 21, 28 Pac. 955; *Perkins v. The State*, 4 Ind. 222; *Burdick v. Hunt et al.*, 43 Ind. 381; *The State v. Van Buskirk*, 59 Ind. 384; *Shattuck v. The State*, 11 Ind. 473; *State v. Wood*, 53 N. H. 484; *United States v. Kirkwood*, 5 Utah, 123, 13 Pac. 234.

The next serious contention is that, because the appellant as a member of the board of education had no legal authority personally to make the contract for the cleaning of the school buildings, the prosecution for bribery in accepting money to make such a contract must fail. This point is urged in complaint of certain instructions given, and of error in refusing to allow the motions for a new trial and in arrest of judgment. So far as this contention bears upon the charge

The State v. Campbell.

in the indictment, the former decision in this case is controlling. The motion in arrest of judgment was based upon three grounds:

"(1) That the facts stated in the indictment filed in this cause and upon which the defendant was tried do not constitute a public offense. (2) That the facts stated in the indictment filed in the case and upon which the defendant was tried are not sufficient to constitute an offense or sustain the verdict heretofore rendered against the defendant in said cause. (3) That the indictment filed in this cause and upon which the defendant was tried has never been signed by the prosecuting attorney of said county."

When this case was here before it was held that the indictment was properly signed and sufficient in substance, so that upon every question raised in the motion in arrest of judgment the former decision is the law of the case. But it is urged that the evidence of the state shows that the board placed the matter of letting the contract for this work in the hands of Biscomb, superintendent of buildings, and that if the evidence shows that anything was done by appellant it is that he himself let the contract to Gilhaus. It is the contention that, as Biscomb alone could lawfully let the contract, no offense was committed.

The case of *State v. Butler*, 178 Mo. 272, 77 S. W. 560, is relied upon. In that case the defendant was charged with bribery in offering money to Doctor Chapman, a member of the board of health, to influence his vote upon the letting of a contract for the disposal of garbage. The board of health was given authority to make the contract by an ordinance of the city of St. Louis. The point was raised that the removal of garbage was a public work and the authority to contract therefor belonged to the board of public improvements, and that the ordinance giving the authority to the board of health was invalid. This view was sustained, and the court held that offering money to a member of the board of health to influence his action in letting

such contract did not constitute bribery. The contract, providing for an expenditure of \$65,000, was in fact entered into by the board of health, and when executed doubtless a plea of *ultra vires* on the part of the city in defense of payment would not have proved availing. The money offered was clearly to influence the officer to do what the bribe-giver and every one else believed he had authority to do, and which if done would, under some circumstances, bind the city.

The decision in that case is one which does not appeal to our sense of justice, nor does the reasoning satisfy our views of the law of bribery. Let us transpose the facts and suppose that instead of the board of health the ordinance had authorized the board of public works to let contracts for the removal of garbage; and suppose that the bribe had been offered to a member of the board of public works: it is apparent that the ingenuity of counsel would have at once discovered the same defense. It appears that the charter of St. Louis gives to the municipal assembly power to enact laws to prevent the introduction and spread of contagious diseases and to secure the general health of the inhabitants by any measure necessary, and to pass laws to sustain good government, the health and welfare of the city, and to establish a sanitary system. With equal plausibility it might in such a case be argued that the disposal of filth and slops, instead of being a public improvement, such as water-works, streets, sewers, bridges, public buildings, parks, boulevards, harbors, and wharves, looking to permanency and requiring repair and improvement, very properly belonged to the department which for years had controlled it, namely, the board of health, and therefore the ordinance attempting to give authority to the board of public improvements was invalid and the offer of money no bribery.

The second ground upon which the decision was based is, perhaps, as unsatisfactory. The particular

The State v. Campbell.

ordinance in question was passed by the council and signed by the president of the council September 11, 1901, and signed by the speaker of the house of delegates on September 13, 1901. On September 17, 1901, the mayor reported to the council that he had signed the ordinance. Doctor Chapman testified that defendant came to his house on the evening of September 16 and offered him the bribe. The trial court instructed that if defendant knew the ordinance had been passed and that the matter might come before the board for action, and offered the money to influence the vote of the member, it was bribery. The supreme court held that because the ordinance was not signed until the next day the board of health had no authority to let the contract, and therefore it was not bribery to offer money to influence the action of a member of the board.

Suppose a member of the board of county commissioners is offered \$100 to influence his vote upon a claim filed before the board against the county, and that the next day when the matter is to come before the board it is discovered that the claim is not such a one as can be allowed because it is not verified or itemized as the statute requires; suppose it is amended, and the member votes to allow it: could it be claimed in defense of the charge of offering or accepting the bribe that when the bribe was offered and accepted there was in fact no lawful claim pending before the board? In the case of *The State v. Gregory*, 46 Kan. 290, 26 Pac. 747, defendant was charged with perjury in an affidavit to a claim filed against Finney county. The defense was that the claim appeared upon its face to have been barred by the statute of limitations, and not being a claim which the board could lawfully allow the oath was not material. The trial court set aside the conviction, and upon a second trial quashed the indictment. On appeal by the state the cause was reversed.

The court in the Butler case (*State v. Butler*, 178

The State v. Campbell.

Mo. 272, 77 S. W. 560) seeks to distinguish that case from *State v. Ellis*, 33 N. J. Law, 102, 97 Am. Dec. 707, where there was pending before the common council an application for permission to lay a railroad-track in the streets of the city. A member of the council was offered a bribe to influence his vote thereon. It was contended that as the council had no authority to grant the application there could be no bribery. The contention of defendant was not upheld. The Missouri court approves the ruling, and uses this language: "It was immaterial whether the action of the council could be enforced. It was a matter pending before the council, upon which the members had a right to vote. It was not necessary 'that the vote, if procured, would have produced the desired result.'" (Page 333.) It is somewhat difficult to understand how the result in the Butler case was reached and the ruling of the Ellis case approved. The Missouri statute is slightly different from ours. It contains the words "which may by law be brought before him," and the court construes these words to mean "a law in force at the time of the offer to bribe." (Page 319.) Our statute defines bribery as follows:

"Any officer of the state or of any county, city, district, or township, after his election or appointment, and either before or after he shall have qualified, or entered upon his official duties, who shall accept or receive any money or the loan of any money, or any real or personal property, or any pecuniary or other personal advantage, present or prospective, under any agreement or understanding that his vote, opinion, judgment or action shall be thereby influenced, or as a reward for having given or withheld any vote, opinion, or judgment in any matter before him in his official capacity, or having wrongfully done or omitted to do any official act, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment for not less than one year nor more than seven years in the penitentiary at hard labor, or by both such fine and imprisonment, at the discretion of the court." (Gen. Stat. 1901, § 2212.)

—

The State v. Campbell.

Appellant was a member of the board of education, which had the exclusive power to act in reference to cleaning the schoolhouses. It was the duty of the board to act. The duty devolved upon him to participate. The gravamen of the charge was feloniously receiving money as a bribe for giving his vote, opinion, judgment and action in favor of letting or causing to be let the contract with Gilhaus. True there was no vote, but there was opinion, judgment and action by him in favor of giving Gilhaus the contract. He saw Gilhaus and made the arrangement with him, agreed upon the terms—the amount Gilhaus was to be paid—and introduced him to the superintendent of buildings, so that the superintendent to whom the letting had been referred adopted and acquiesced in appellant's action. Appellant was acting officially when he saw and arranged with Gilhaus to do the work, although if the arrangement had not been adopted by the superintendent there might possibly have been a question of the authority of appellant to make the contract. He "permitted and caused to be let" the contract in question. If, therefore, he accepted money to influence his action in causing the contract to be let, why is he not guilty of accepting a bribe as contemplated by the statute? A valid contract was let through his influence—his official opinion, judgment, and action. The mere fact that before it could be made valid it had to be ratified by the superintendent of buildings, to whom he took Gilhaus, in no legal sense destroys the criminal nature of his offense. In our view of the law, to hold otherwise would be placing entirely too much importance upon a play of words—giving to strained technicalities more consideration than they deserve in order to avoid rather than attain substantial justice. In *People v. Ellen*, (Mich.) 100 N. W. 1008, the court held:

"Where a proposition to let a contract for water-works was one which might come before a city council for official action, the fact that the council has no au-

thority to enter into the contract proposed did not prevent the payment of money to councilmen to influence their action on the same from constituting [bribery.]" (Syllabus.)

(See, also, *People v. McGarry*, 136 Mich. 316, 99 N. W. 147; *Glover v. The State*, 109 Ind. 391, 10 N. E. 282; *The State v. Potts*, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814; *The State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 66 L. R. A. 490, 103 Am. St. Rep. 670.)

Complaint is made that the testimony of witness Lilly in reference to the amount Gilhaus charged him for similar work was immaterial, and that no foundation was laid showing that the conditions were the same. The work consisted of pumping mud and water out of a building in the same flooded district with a steam-pump, and the work was done soon after the other work was completed. The testimony was material as evidence of a circumstance bearing upon the price allowed Gilhaus and the intent with which the money was received.

There was no error in admitting in evidence the \$412 check from Gilhaus to appellant. It was competent to establish the payment of the money by Gilhaus which appellant was charged with receiving from him. (*People v. McGarry*, 136 Mich. 316, 99 N. W. 147.)

Appellant insists that the court erred in refusing him a new trial, alleging three grounds:

(1) On account of newly discovered evidence, consisting of a letter dated September 21, 1889, addressed to him at Sioux City, Iowa, written by his patent attorney, in reference to his claim for letters patent upon the steam valve. This would have merely corroborated his own testimony that years before he had made an effort to secure a patent. It could not have been material evidence to disprove the charge of bribery.

(2) To enable appellant to procure the testimony of G. E. Gilhaus, a witness whose name was indorsed

upon the indictment, and for whom the state had issued a subpoena. Appellant claims that it was the duty of the prosecution to produce all the witnesses whose names were indorsed upon the indictment; that it was particularly its duty to procure the attendance of Gilhaus; and that he had the right to rely upon the performance of this duty. Cases are cited to the effect that a prosecutor owes the duty of laying before the jury all the facts of which he is informed and has the means of proving, and other cases holding that all witnesses whose names are indorsed upon the indictment should be called and sworn and defendant given an opportunity to cross-examine them. This may be the rule in some jurisdictions, but we believe it has never been recognized as the proper practice in criminal actions in this state. A prosecutor is bound by his oath to perform his duty fearlessly and vigorously. He is not to seek to convict a man whom he knows to be innocent, or to conceal facts which would establish one's innocence; and his duty to the court forbids him to employ trickery to convict any one. But he is not required to place on the stand every witness whose name happens to be indorsed upon the indictment, nor is he required to produce a witness merely because he has issued a subpoena for such witness. The defendant has no right to rely upon the presence of witnesses for whom subpoenas have been issued by the state. At his request the court may order a witness under subpoena by the state to remain; and other opportunities are afforded him for procuring the attendance of witnesses in his own behalf.

(3) The third ground for a new trial which is insisted upon is misconduct of the attorney-general in his closing argument to the jury. Affidavits of several persons present at the trial were offered to show that in his remarks counsel for the state told the jury that the appellant was not satisfied with a bribe from Gilhaus, but that he had "bought lots for \$150 apiece and

sold them to the school board for \$1000 apiece." The trial court evidently accepted as true the affidavit of General Coleman that he had made no such statement. He explains that he did use substantially the following language:

"This thing of giving a makeshift and sham consideration for money really received as a bribe is no new thing. You have all doubtless heard of the thrifty member of the legislature, not of Kansas, but of some other state, who owned a cheap lot down in Missouri not worth over \$150; how there was a bill pending before the legislature in which a certain rich corporation was deeply interested, and how the thrifty legislator voted for that bill, and how, immediately after it was passed, he sold that cheap lot of his to the same rich corporation for the sum of \$1500. Of course he claimed he had not accepted a bribe; he just sold a lot. So, in this case, Campbell did not accept a bribe; he tells you he simply sold a valve."

There had been, of course, no evidence of any such transactions upon the part of appellant; and, aside from his positive denial, the extreme improbability of counsel having employed the language imputed is apparent. The ruling of the trial court upon the motion should be regarded as a finding against defendant's affidavits. The language which counsel admits having used was not improper in argument. We have considered the other remarks of counsel of which complaint is made, and find nothing prejudicial to appellant or which warranted a new trial.

It becomes unnecessary to consider the errors complained of in the instructions to the jury, for the reason that from our view of the law governing this case it follows that the instructions were properly given. The judgment is affirmed.

All the Justices concurring.

73	722
75	34

73	722
76	410
77	534

73	722
78	396

THE PARKER-WASHINGTON COMPANY V. THE CITY OF KANSAS CITY *et al.*

No. 14,756. (85 Pac. 781.)

SYLLABUS BY THE COURT.

1. **CONSTITUTIONAL LAW—*Amendment or Repeal of a Statute by Implication.*** Statutes which effect the amendment of existing laws by implication are not within the purview of the constitutional provision that "no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed." (Const. art. 2, § 16; Gen. Stat. 1901, § 134.)
2. ——— ***Classification of Cities—Laws Applicable to a Class.*** It is competent for the legislature to classify cities according to population for various purposes, and laws applicable to all of the members of any class so created may be general laws and have a uniform operation throughout the state.
3. ——— ***Reasonable Classification.*** The matter of the method of providing for the cost of street improvements is one with relation to which cities may reasonably be divided into classes upon the basis of population.
4. ——— ***One City in a Class—Law Not Special.*** A law for the government of cities of a certain population is not rendered special in its operation by the fact that there is at the time only one city in the state of the size designated.
5. ——— ***Cities Having Over 50,000 Population—Payment for Street Improvements.*** Chapter 112 of the Laws of 1905, providing that in cities of the first class having over 50,000 population payment for street improvements shall be made by the issue of tax bills chargeable against the property specially benefited instead of by the issue of negotiable bonds of the corporation, is not obnoxious to that provision of the constitution relating to the amendment of laws, or to that forbidding the conferring of corporate powers by special act, or to that requiring general laws to have a uniform operation throughout the state.
6. **BONDS—*Contractors—Character of Surety—Legislative Control.*** It is competent for the legislature to require that persons contracting with cities for the improvement of streets shall give bonds for the faithful carrying out of their contracts, executed by some surety company authorized to do business in the state.

Parker-Washington Co. v. Kansas City.

Original proceeding in mandamus. Opinion filed May 12, 1906. Writ denied.

T. A. Pollock, for plaintiff.

E. S. McAnany, Ralph Nelson, and Nathan Cree, for defendants.

The opinion of the court was delivered by

MASON, J.: The statute for the government of cities of the first class as it existed prior to 1905 authorized all such cities to issue bonds to cover the expense of improving streets. In 1905 an act was passed providing among other things that in cities of the first class having a population of over 50,000 such expenses should be met by the issuance of special tax bills against the property chargeable with the cost of such improvements. (Laws 1905, ch. 112.) After this act took effect the Parker-Washington Company, under a contract with the city, constructed some pavement in Kansas City, Kan. By the terms of the act payment for this work should be made by tax bills, but the company now brings this proceeding seeking by mandamus to compel the city to make payment by bonds, under the provisions of the old law, upon the theory that the act of 1905 is void because it violates these several provisions of the state constitution: (1) That relating to the method of amending existing laws; (2) that forbidding the conferring of corporate powers by special act; and (3) that requiring laws of a general nature to have a uniform operation throughout the state.

The portion of section 16 of article 2 of the constitution invoked in support of the first proposition reads: "No law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed." (Gen. Stat. 1901, § 134.)

It is argued that the act of 1905 amends various

specific sections of the statute relating to cities of the first class, the language of which is closely followed in the corresponding sections of the new act, only such alterations being made as are necessary to accomplish the object already indicated—a change in the method of paying for public improvements in cities having a population of over 50,000; that the new act contains no reference to the old one, does not accomplish its repeal, and is therefore within the letter and spirit of the prohibition quoted. It is needless at this time to go into a discussion of the purpose and effect of the provision of the constitution referred to. That it has no application to amendments by implication is well settled. (Cooley, Const. Lim., 6th ed., 182; 26 A. & E. Encycl. of L. 708.) The act of 1905 in a sense amends various sections of the earlier act, but it does so by implication; it does not cover their entire subject-matter, and hence does not supersede them, but merely restricts the field of their operation; it is a complete and in a sense an independent enactment, which requires no reference to any other statute to make its meaning clear. The objection made to it in this respect is therefore not well taken.

Section 1 of article 12 of the constitution provides that “the legislature shall pass no special act conferring corporate powers” (Gen. Stat. 1901, § 210), and section 17 of article 2 that “all laws of a general nature shall have a uniform operation throughout the state.” (Gen. Stat. 1901, § 135.) Whether the act in question is to be regarded as special and whether its operation is uniform throughout the state depend upon whether population affords a fair basis for the classification of cities with reference to the matters to which it relates, and whether the result it accomplishes is in fact a real classification upon that basis, and not a designation of a single city to which alone it shall apply, under the guise of such classification.

“In order to determine whether or not a given law

Parker-Washington Co. v. Kansas City.

is general, the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class to be general. But if the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but local and special." (26 A. & E. Encycl. of L. 683.)

That for many purposes the classification of cities according to population is a natural and proper one is clear, and we think has never been doubted. The statutes providing for municipal government in this state have always proceeded upon the theory that a system adapted to a small town might not be suitable for a larger one. The theory has not been attacked, and is not open to attack. This general principle reaches the present case. Merely for illustration it may be suggested that the legislature was warranted in believing that in a large city there would be no difficulty in procuring all needed street improvements by issuing to the contractors non-negotiable obligations running directly against the property specially benefited, while in a smaller city the same result could only be assured by pledging the credit of the whole municipality to the final payment of the cost by the use of negotiable bonds.

Granting the reasonableness of the principle of classification, its application rests with the legislature and is not subject to judicial review, although an extreme case could perhaps be imagined in which a court would be justified in holding that an ostensible classi-

fication upon the basis of population was only colorable, its real purpose and effect being to limit the application of an act to a single community or group of communities, not distinguishable from others by any differences having relation to the subject-matter involved. Counsel for plaintiff contends that the present instance is such a case. Judicial notice is of course taken that Kansas City is now the only city in Kansas having over 50,000 inhabitants. This is not determinative of the matter, however, for it is not only conceivable and probable but practically inevitable that other cities in the state will in time attain that size. As was said in *The State v. Downs*, 60 Kan. 788, 57 Pac. 962:

"An act general in its provisions, but which can presently apply to only one city on account of there being but one of requisite population or other qualification, but which was designed to, and can in all substantial particulars, apply to other cities as they become possessed of the requisite population or other qualification, cannot be regarded as a special act." (Page 793.)

In the plaintiff's brief much stress is laid upon the case of *State, ex rel. Knisely et al., v. Jones et al.*, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592, where the court set aside an act purporting to provide a general scheme for the government of all cities in the state by dividing them into a number of classes and subclasses or grades. The ground of the decision is clearly shown by this language of the opinion:

"In view of the trivial differences in population, and of the nature of the powers conferred, it appears . . . that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state." (Page 487.)

The full force of this statement can be appreciated only from a consideration of the precise situation by

which the supreme court of Ohio was confronted. The legislature had originally divided all municipal corporations, according to population, into cities of the first class, cities of the second class, incorporated villages, and incorporated villages for special purposes. Separate rules were made for the government of each kind of organization, but as each municipality attained a size entitling it to a place in the next higher class it was advanced thereto by virtue of the statute. Later, subdivisions were made of these primary classes by means of which single cities became in fact vested for the time being with peculiar powers, and were governed by what were in fact charters for local government differing from those of any other city in the state. The court upon the view that this legislation fell within the rule already stated "reluctantly" upheld its validity.

Gradually the tendency toward the localization of municipal law increased, until at the time of the decision under consideration cities of the first class were divided into three grades, and cities of the second class into eight grades, and as a result each one of the eleven principal cities of the state was governed according to a plan different from that of any other. Moreover, during the time that Cincinnati was the most populous city of the commonwealth it was governed by a statute which in operation applied to it alone and was sustainable only on the theory that the legislature believed such a statute to be required by, or at least to be peculiarly suitable to, a city of that size. But when the growth of Cleveland placed it in advance of Cincinnati in the matter of population, instead of its becoming endowed with those powers which had been determined to be appropriate the old plan for its government was perpetuated by the device of shifting the classification. This situation certainly forced upon the court the duty of seriously considering the difficult question of when, if ever, the limit of legislative discretion is reached—

when, if ever, it may be judicially determined that a statute bears upon its face, or discloses in the light of all the information of which a court may avail itself, proof of the intention of the legislature, under color of the exercise of an undoubted right, to evade and in effect to nullify an express mandate of the constitution. But this was not all. Hitherto the pretext had been maintained that the classification was real—that as each city advanced in population and passed the boundary marked by the general law it would in virtue of that growth, either *ipso facto*, or by means of machinery provided by the law, pass into the next higher grade and become amenable to the statute relating thereto. But the statute which was directly involved in that case, with the obvious purpose of preventing such a result, at least in respect to two cities, created a new grade—a fourth grade of the first class, of which the court said:

“We are not aware that there is now in the state a city of the fourth grade of the first class, but the class is provided to the end that it may receive any city of the second class which may be advanced, and that such city may thus be excepted from the operation of these acts relating to Cleveland and Toledo, which are, respectively, cities of the second and third grade, of the first class.” (66 Ohio St. 453, 486.)

The conclusion of the court is thus expressed:

“The body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution. The provisions of the section could not be more clear or imperative, and relief from the present confusion of municipal acts and the burdens which they impose would not be afforded by its amendment. Since we cannot admit that legislative power is in its nature illimitable, we must conclude that this provision of the paramount law annuls the acts relating to Cleveland and Toledo.” (Page 487.)

We see no just ground of criticism of this Ohio decision. We have stated the circumstances out of which it grew in some detail, for the purpose of showing the extreme length to which specialization of the law was permitted to be carried under the form of general enactments before the courts felt justified in interfering, and also of showing the wide difference between the facts of that case and of this. By the Kansas act under discussion the legislature in effect created a new class of cities. In doing so it did not approach near enough to the line which separates the legitimate exercise of legislative discretion from the illegitimate employment of a guileful device to accomplish an unconstitutional end by indirection to make it at all difficult for the court to sustain its action. The act is proof also against this attack.

A further objection is incidentally made to the statute because of a provision that all persons contracting with the city to make street improvements shall be required to secure the faithful performance of their contracts by the giving of bonds executed by some surety company authorized to do business in the state. It is argued that this tends to the creation of a monopoly in the business of making such bonds. The writing of such bonds is a form of insurance. There are reasons why a bond given by a corporation over which the state exercises a certain control might be deemed preferable to any executed only by individuals. It would be competent for the legislature to authorize the municipality in its discretion to exact such a bond—that is, one signed by a surety company; and it is equally competent for it to exercise its own judgment in the matter in the first instance and require that character of security.

The writ is denied.

All the Justices concurring.

The State v. Logan.

THE STATE OF KANSAS V. WILLIAM LOGAN.

No. 14,770. (85 Pac. 798.)

SYLLABUS BY THE COURT.

JURY AND JURORS—Deliberations—Consultation—Individual Responsibility. An instruction relating to the individual responsibility of each juror in a criminal case which implies that he is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous.

Appeal from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed May 12, 1906. Affirmed.

STATEMENT.

THE defendant was tried, convicted and sentenced in the district court of Atchison county for the crime of burglary in the second degree, and appeals to this court.

C. C. Coleman, attorney-general, and F. S. Jackson, assistant attorney-general, for The State.

W. W. Guthrie, for appellant.

The opinion of the court was delivered by

SMITH, J.: Two errors are alleged in addition to the denying of a motion for a new trial: First, the refusal to give instruction No. 10 asked by the defendant, which reads as follows:

"The defendant is entitled to the separate judgment of each and every one of the twelve jurors, and it is the duty of each juror to refuse to concur in a verdict of guilty unless he is satisfied in his own mind that each and every fact necessary to establish the guilt of defendant has been established by the evidence beyond a reasonable doubt."

This instruction was probably intended to be framed after an instruction approved in *The State v. Witt*, 34 Kan. 488, 495, 8 Pac. 769, which reads:

"If any one of the jury, after having considered all

The State v. Logan.

the evidence in this case, and after having consulted with his fellow jurymen, should entertain a reasonable doubt of the defendant's guilt, or, after such consideration and consultation, should entertain a reasonable doubt as to whether or not the defendant was present at the time and place of the commission of the alleged homicide, then the jury cannot find the defendant guilty."

It will be observed, however, that a material element in the individual responsibility resting upon each juror is omitted from the instruction requested, and it is therefore erroneous. The verdict of a jury is the combined judgment of twelve men who have all heard the same evidence, each one of whom may have received some impression therefrom differing from that of all his fellows, and is not the separate, independent act of twelve men—that is, twelve independent verdicts. After hearing the evidence and the arguments of counsel thereon, *pro* and *con*, in which arguments the evidence is usually sought to be harmonized with the conclusion of the guilt of the defendant by the attorneys for the state and with the conclusion of the innocence of the defendant by the attorneys for the defendant, the jurymen are segregated to permit them to consult and compare views, for the purpose, of course, of coming to a common conclusion that will satisfy the judgment of each juror. If such common conclusion can be arrived at it should be embodied in a verdict. If it cannot be arrived at there should be a disagreement. Witnesses may feel an interest or a sympathy for one side or the other, and counsel are presumed to use all honorable efforts in favor of the side for which they appear. The deliberations, therefore, of the jury, in which all the evidence should be considered, as well as all of the different theories of counsel and the different impressions of the individual jurors, are of the utmost importance; and any instruction as to the individual responsibility of a juror which omits the important matter of consultation is clearly erroneous. The in-

The State v. Logan.

struction asked in this case should have been, as it was, refused.

As to the second error complained of, it is the province of counsel in argument to apply the instructions of the court to the facts as shown by the evidence, and then to aid the jury in so doing. In the argument of the county attorney in this case he told the jury that the term "reasonable doubt" in the instructions of the court did not mean a mere imaginary or captious doubt. Defendant's counsel thereupon objected, and the court remarked that while the court had not used those words in its instructions the definition of "reasonable doubt" was probably correct. This was no new instruction, and was not therefore required to be written. It was simply an elaboration of words. It was an illustration of what "reasonable" means—not imaginary, not captious. In this there was no error.

Counsel for appellant makes a strong and vigorous argument in support of his contention that the court should have set aside the verdict of the jury and granted a new trial on the ground that the verdict is contrary to the evidence. It is contrary to much of the evidence, and is in accord with much of the evidence. If the jury had believed the evidence upon which the attorney for the appellant places emphasis, and had disbelieved the evidence for the state, their verdict should have been different. It is the especial duty of the jury to determine the weight and credibility of the evidence, and when they have done so, and the court has approved the verdict, this court will not reverse the result on this ground, providing, of course, there is evidence which, if credible, sustains the conclusion reached.

The judgment of the district court is affirmed.

All the Justices concurring.

—

THE STATE OF KANSAS V. ANDY SWEIZEWSKI.

No. 14,788. (85 Pac. 800.)

SYLLABUS BY THE COURT.

CRIMINAL LAW—*Circumstantial Evidence—Sufficiency.* In a trial on the charge of a violation of the prohibitory liquor law, as well as in the trial of any other criminal charge, circumstantial evidence may be considered by the jury; but, as in all other criminal cases, before a jury is justified in convicting the defendant upon circumstantial evidence alone the circumstances proved must not only all be consistent with the theory of the defendant's guilt, but they must be so strong as to exclude any other reasonable hypothesis.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed May 12, 1906. Reversed.

C. C. Coleman, attorney-general, and *Burton E. Clifford*, for The State.

Ewing, Gard & Gard, and *Hazen & Gaw*, for appellant.

The opinion of the court was delivered by

SMITH, J.: The appellant was indicted on eight counts for selling intoxicating liquors in violation of law, and on one count for maintaining a common nuisance, by a grand jury of Allen county; and, upon being brought to trial in the district court, the case was dismissed as to all but three counts for unlawful sales and the one count for maintaining a nuisance. On the trial the jury found the appellant guilty on the three counts for unlawful sales, and not guilty upon the charge of maintaining a nuisance. The appellant filed a motion for a new trial on the ground that the verdict was not sustained by the evidence, which motion was denied, and he was sentenced and now appeals to this court.

The county attorney admits that there was no evidence to show that the appellant by himself, or through any agent or employee, made the sales upon which he

The State v. Sweizewski.

elected to rely for conviction; and indeed it does not appear from the record that the witnesses who testified to buying intoxicating liquor were even asked on the part of the state from whom they made the purchases. If it be assumed that the witnesses knew from whom they made the purchases, the examination would indicate that there was no real attempt made to convict the appellant. However, it is contended on the part of the state that the evidence did disclose these facts, to wit:

“(1) That this defendant conducted a barber shop on North Washington avenue, in the city of Iola, in a rear room of which liquor was sold; (2) that this defendant was frequently in said back room, as often as two or three times a day; (3) that persons going to and from this said back room would go through this defendant's barber shop.”

It is further said the court correctly instructed the jury that if they believed beyond a reasonable doubt that the defendant knowingly and intentionally aided or abetted in the commission of the alleged sales, then they would be warranted in finding him guilty; and that the facts above recited are sufficient to sustain the verdict of the jury.

These facts are purely circumstantial. Before a jury is justified in finding a defendant in a criminal action guilty upon circumstantial evidence alone the circumstances must be so strong as not only to be consistent with the theory of the defendant's guilt, but they must also exclude every reasonable hypothesis except that of the guilt of the defendant. The facts above relied upon do not exclude every reasonable hypothesis save that of the defendant's guilt, but do suggest that the defendant for numerous reasons may be entirely innocent.

The motion of the appellant for a new trial should have been granted, and the judgment of the court below is reversed, with instructions to grant a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. CHAUNCEY DEWEY, J. W.
MCBRIDE, AND CLYDE WILSON.

No. 14,795. (85 Pac. 796.)

THE STATE OF KANSAS V. CHAUNCEY DEWEY, J. W.
MCBRIDE, AND CLYDE WILSON.

No. 14,796. (85 Pac. 796.)

THE STATE OF KANSAS V. CHAUNCEY DEWEY, J. W.
MCBRIDE, AND CLYDE WILSON.

No. 14,797. (85 Pac. 796.)

SYLLABUS BY THE COURT.

1. **CRIMINAL LAW—Continuance—Discharge—Waiver.** A person under indictment and held to bail who claims the right to be discharged because he has not been brought to trial before the end of the third term of court held after the indictment was found or information filed must bring himself within the spirit and intention of the statute in order to be entitled to its benefits. His rights under the statute may be waived. If he has consented to a continuance of his cause at the third or any subsequent term, or failed to object to such continuance made when he was present, such term cannot be claimed by him as one of the terms at which he should have been brought to trial. (See *post*, p. 739.)
2. ——— **Discharge—Acquittal.** The discharge of a person under indictment when not brought to trial, as provided in section 221 of the code of criminal procedure (Gen. Stat. 1901, § 5666), amounts to an acquittal of the offense charged.

Appeals from Norton district court; ABEL C. T. GEIGER, judge. First opinion filed May 12, 1906. Affirmed. Rehearing granted October 6, 1906. Second opinion filed February 9, 1907. Reversed.

C. C. Coleman, attorney-general, and F. S. Jackson, assistant attorney-general, for The State.

Waters & Waters, for appellants.

The opinion of the court was delivered by

PORTER, J.: In the first of these cases appellants were charged with assault with intent to kill Roy Berry, in the second with murder in the first degree

The State v. Dewey.

for the killing of Alpheus W. Berry, and in the third with murder in the first degree for the killing of Daniel P. Berry.

On May 1, 1905, the first day of the regular May term of court, appellants filed motions in each case, under section 221 of the code of criminal procedure (Gen. Stat. 1901, § 5666), asking to be discharged on the ground that more than three terms of court had elapsed after indictment without their having been brought to trial. On the 2d day of May these motions were denied; at the same time, upon the request of the county attorney, and over the objections of appellants, the court entered an order in each case dismissing it "without prejudice." Exceptions were saved, and the appellants bring the causes here for review. Error is alleged in the rulings on the motions of appellants and in the entering of the orders requested by the county attorney.

The record in each case discloses that the information was filed in the district court of Cheyenne county on December 2, 1903. On the application of defendants the venue was changed to Norton county, and a certified copy of the information was filed in the district court of that county January 12, 1904. The regular February term of the district of Norton county convened February 1, 1904, and at this term the cases were continued by the court. At the regular May, 1904, term of the court orders were entered for continuances over the term on account of there being no jury in attendance, none having been called. On the last day of the regular September, 1904, term of the court continuances were ordered by consent of the parties. The regular February, 1905, term of court convened February 6, 1905, at which time defendants appeared and announced themselves ready for trial, and the cases were passed until a later day. Afterward they were continued over the term, defendants being present and making no objection. The defend-

ants were on bail during all the time from the filing of the informations.

There are two questions raised: (1) Whether the court erred in denying the applications of appellants to be discharged; (2) whether error was committed in dismissing the actions without prejudice. The consideration of the first will necessarily dispose of the second. Our statute reads as follows:

"If any person under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to such offense, unless the delay happen on his application or be occasioned by the want of time to try such cause at such third term." (Gen. Stat. 1901, § 5666.)

There is some diversity of opinion among the members of the court with respect to the proper construction to be given this statute. According to one view, the words "before the end of the third term of court" refer to a distinct period of time measured by the first three successive terms of court, and if at the end of the third term the person under indictment be not entitled to claim the benefit of the statute because delay has happened on his application, or for want of time to try the cause, then a new period of like duration begins; the slate is wiped clean, and the state has another three-term period in which to bring him to trial. Under this theory single terms of court are not counted against the state and in favor of the accused. Another theory counts the first, second and third terms. If the accused ask for a continuance at the first, second or third term, or the delay at either of them be occasioned by want of time to try the cause, that particular term is not counted, and the state has an additional term in its stead in which to bring him to trial. Another view gives all importance to "such third term," and regards what transpired at the first

or second as of no consequence. If at the end of the third term he be not entitled to claim the benefit for the reason that the delay at that term happened on his application, the state has another term in which to bring him to trial. In *The State v. Campbell, ante*, p. 688, it was held that the terms of court intervening while an appeal by the state is pending should not be counted, although the statute makes no exception in such a case.

In the cases at bar we are not left in doubt as to the theory of the trial court in refusing to discharge the appellants. The orders recite that the court held that if the applications should be presented at the last day of that term, or the first day of the following term, they would be granted. The court apparently considered that appellants were not entitled to count the third regular term of court for the reason that they consented to a continuance at that term, and were likewise not entitled to count the fourth for the reason that they were present and made no objection to the causes being continued at that term.

There is no diversity of opinion that in any view of the statute the appellants were not entitled to be discharged at the time their application was presented. A defendant may waive his rights under the statute. He may do this by consenting to, or by failing to object to, a continuance at the third or subsequent term. The court therefore committed no error in refusing to discharge the appellants. The regular third and fourth terms of court are not to be considered as terms at which they should have been brought to trial. In the one they consented to a continuance; in the other they were present and made no objection when the continuance was ordered.

Under a statute which has been construed so liberally as this has been—to mean that when discharged under it a defendant is to be deemed as acquitted of the charge against him (*The State v. Edwards*, 35

The State v. Dewey.

Kan. 105, 10 Pac. 544), we think that before a defendant is entitled to such an order he must bring himself clearly within the spirit and intention of the statute. Its purpose was not to enable the guilty to escape upon technicalities, but to shield the innocent by preventing unnecessary and unreasonable delays. A defendant under indictment who consents, or raises no objection, to his case being continued is not within the purpose and intention of the law. Delay does not hurt him; often it serves his purpose better than a speedy trial. The judgment is affirmed.

All the Justices concurring.

OPINION ON REHEARING.

(88 Pac. 881.)

SYLLABUS BY THE COURT.

CRIMINAL LAW — Continuance—Discharge—Statute Construed.

In determining whether a person under indictment and held to bail is entitled to be discharged under section 221 of the code of criminal procedure (Gen. Stat. 1901, § 5666), it is proper to count the terms of court held after indictment found or information filed, omitting any term at which the delay happened upon his application. Any term at which he has consented to the delay or postponement cannot be claimed as one at which he should have been brought to trial; but a postponement or delay ordered by the court cannot be regarded as happening on his application merely because he fails to object.

The opinion of the court was delivered by

PORTER, J.: These cases have been argued a second time, upon rehearing. Upon further consideration we are of the opinion that the views expressed in the former decision are not in harmony with the true construction of the statute designed to carry into effect the constitutional guaranty of the right to a speedy trial.

There are numerous well-considered cases which

support the holding in the former opinion that a continuance granted when defendant is present and not objecting should be considered as made upon his application. This is expressly held in *Maxwell v. The State*, 89 Ala. 150, and *People v. Douglass*, 100 Cal. 1. Other courts have adopted the rule that there is a presumption that continuances were ordered by the court for good cause, and that before defendant is entitled to a discharge by an appeal to a court of review or upon *habeas corpus* the contrary must be made to appear affirmatively. (*Johnson v. State*, 42 Ohio St. 207; *State v. Mollineaux*, 149 Mo. 646, 51 S. W. 462.) But in *In re Begerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. Rep. 178, 56 L. R. A. 513, the exact contrary is held, and it is said that there is no presumption that good cause existed for the trial court's action. This court decided in *In re McMicken, Petitioner*, 39 Kan. 406, that where it clearly appears from the record that the delay did not happen upon the application of the accused, or was not occasioned by want of time to try the case, and that his discharge was not refused to obtain material evidence at a succeeding term, there could be no question that he was entitled to his discharge.

We are inclined to regard the statute as imperative, and to hold that it is enough for defendant to show that the terms of court fixed by the statute passed without his having been brought to trial, and that the delay was not caused upon his application or by want of time to try the case. This is practically what was held in *In re McMicken, Petitioner, supra*, and is the view taken by many of the courts. (See *People v. Morino*, 85 Cal. 515; *The People, ex rel., v. Matson*, 129 Ill. 591.)

The case of *In re Begerow, supra*, is reported in 85 Am. St. Rep. 178, and in 56 L. R. A. 513, with very full annotations, in which will be found the rulings of the courts upon statutes similar to ours. A review of these authorities discloses such variance and conflict that they furnish little assistance in determining the

The State v. Dewey.

proper construction to be given to the statute here. The legislature, in making provision for carrying into effect the constitutional guaranty of a speedy trial, has declared that at the end of the third term of court the accused shall be discharged, if not brought to trial before that time, provided the delay has not happened on his application, or been occasioned by want of time to try the cause at such third term. Two questions arise: (1) Shall a continuance to which the accused makes no objection be held to have been made upon his application? (2) How shall the words "by the want of time to try such cause at such third term" be construed? The meaning of "application" is the employment of means to accomplish an end. It denotes affirmative action, not passive submission. Giving the term its ordinary and literal meaning, it would seem that a postponement ordered by the court upon its own motion, or upon the application of the state, should not be regarded as happening upon the application of the accused merely because he fails to object. We are of the opinion that our former ruling, that by the failure to object to a continuance at any term the person under indictment loses the right to count that term as one at which he should have been brought to trial, is not in harmony with the intent of the statute or the proper regard for the constitutional guaranty of a speedy trial.

The second question—How shall the language of the statute, "by the want of time to try such cause at such third term," be construed?—is, we think, not difficult. Obviously it has reference to the condition of affairs at such third term only. It is a saving clause, designed to protect the right of the state still to bring the accused to trial at a succeeding term in those instances where the state has not been dilatory at the third term, but, on the contrary, was ready for trial and was only prevented by circumstances which the statute recognizes as liable to occur, and over which

the state has no control—want of time to try the cause at such third term.

Referring again to the facts which are recited in the former opinion, it clearly appears from the record that at the first, or February, 1904, term the causes were continued by the court. No reasons are stated, and this must be counted as the first term. At the May, 1904, term continuances were ordered by the court for the reason that there was no jury present. The failure to provide for the attendance of a jury to try causes must, beyond question, be regarded as one of the very things the constitutional guaranty of a speedy trial was designed to meet. If an exception can be written into the statute so that a delay caused by the neglect of official duty is to be considered as a good excuse for failure to bring the accused to trial, the constitutional right could be frittered away indefinitely.

It further appears that at the September term the appellants consented to continuances, and we hold that this term cannot be counted as one at which they should have been brought to trial. But there was a February, 1905, term of court; and it appears that the appellants announced themselves ready for trial on the first day, but the court made an order passing the cases until a later day in the term, and afterward they were continued generally. Throwing out the September, 1904, term—when the continuances were by consent—it follows from what has been said that the February, 1905, term should be counted as the third term; and when the state failed to bring the appellants to trial before the end of that term they were entitled to be discharged, if they had made application. Application was made at the next, or May, 1905, term, and the court erred in not ordering their discharge.

Many courts have said that the enumeration of some causes for delay does not exclude all other causes, and have held that where the delay at the third term is occasioned by the illness or death of the trial judge or

In re Smith.

prosecuting attorney, or the occurrence of some unforeseen accident, the accused is not entitled to his discharge. (*People v. Camilo*, 69 Cal. 540; *State v. Hutting*, 21 Mo. 464.) Without passing on that question, it is, we think, obvious that no cause for delay such as contemplated by the statute occurred in the present cases. The weight of authority is that the statute is imperative, and should receive a liberal construction in favor of liberty, having always in mind that its purpose is not to shield the guilty but to protect the innocent. (To the same effect see *State v. Wear*, 145 Mo. 162; *State v. Kuhn*, 154 Ind. 450; *People v. Moran*, 144 Cal. 48.)

The judgments are reversed, and the causes remanded, with instructions to order the discharge of the appellants.

All the Justices concurring.

In the Matter of the Disbarment of J. A. SMITH.
No. 14,864. (85 Pac. 584.)

SYLLABUS BY THE COURT.

1. PRACTICE, DISTRICT COURT—*Change of Venue—Prejudice of the Judge.* An apprehension of a party that a judge is prejudiced against him is not enough to require a change of venue, but it must satisfactorily appear that prejudice in fact exists.
2. ATTORNEYS—*Disbarment—Statutory Grounds Not Exclusive.* The enumeration in the statute of certain acts which will be deemed sufficient for the revocation or suspension of an attorney's license to practice law does not limit the common-law power of the court in that respect, and attorneys may be disbarred for other than the statutory grounds.
3. ——— *Gross Misconduct a Ground for Disbarment.* An attorney may be disbarred not only for malpractice and dishonesty in his profession, but also for gross misconduct showing him to be unworthy of the privileges which the law con-

73	743
179	677
73	743
82	839

In re Smith.

fers on him and unfit to be entrusted with the duties and powers of an attorney.

4. ——— *Proof of Conviction of Crime Not Essential.* Where the charges made against an attorney involve moral turpitude, proof of a conviction is not essential to a disbarment.
5. ——— *Statute of Limitations Not a Defense.* In a proceeding for the disbarment of an attorney the statute of limitations is no defense.
6. ——— *Procedure—Court itself Must Try Facts.* In such a case the court itself is the trier of both facts and law, and these functions cannot be delegated to a committee, commissioner, or referee.
7. ——— *Accusation—Form and Requisite.* The formal and technical requirements of criminal pleading are not required in an accusation, but it is necessary that the charge against an attorney shall be so specific as fairly to inform him of the precise nature of the misconduct of which he is accused. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated or whether some of them are repeated in several paragraphs is not vital.
8. ——— *Sufficiency of Evidence.* The testimony of moral and professional delinquency of the accused is held to meet the requirement that more than a mere preponderance of the evidence is necessary in such cases, and is sufficient to support the judgment of disbarment.

Appeal from Wyandotte district court; J. McCABE MOORE, judge. Opinion filed May 12, 1906. Affirmed.

J. A. Smith, pro se.

Samuel Maher, John A. Hale, and Thomas J. White,
prosecuting committee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was a proceeding brought in the district court of Wyandotte county for the disbarment of J. A. Smith, a practicing attorney in the courts of Kansas. Upon a complaint made that Smith had been guilty of malpractice, and other misconduct, the court appointed a committee of the bar to make a preliminary investigation of the charges and to report whether further action upon the complaint should be taken.

In re Smith.

This committee, after an extended inquiry, recommended that an accusation be filed against Smith. The court accordingly appointed another committee of lawyers to prepare and file an accusation against him, and one containing three paragraphs was drawn and filed.

In the first paragraph it was alleged that Smith was a material witness in a case pending in the district court of Lyon county, as to whether a certain deed purporting to convey the land in controversy was genuine or a forgery; that he was visited by J. W. Blank, who offered to give Smith \$200 if he would testify falsely in the case, or would absent himself so that his deposition could not be taken or service of a subpoena be made upon him; that Smith accepted the offer, and agreed with Blank either to give the false testimony or to absent himself so that his evidence could not be had; that Blank paid Smith ten dollars of the stipulated amount, and to secure payment of the remainder gave Smith a diamond of the value of \$175; that later Blank brought an action of replevin for the recovery of the diamond against Smith in the district court of Wyandotte county, in which Smith stated and made the defense that the diamond was given to him for the immoral and illegal purpose mentioned in the offer; that the trial resulted in a verdict and judgment against Smith, whereupon he instituted a proceeding in error in the supreme court to reverse the judgment, and to that end argued there that because the diamond had been given to him for the aforementioned immoral and illegal purpose there should be a reversal of the judgment, but that upon his own statement and argument the supreme court denied any relief and dismissed the proceeding upon the grounds stated in the decision. (69 Kan. 853, 76 Pac. 858.)

In the second paragraph it was alleged that Smith came into possession of the diamond mentioned in the first paragraph, but that the exact manner in which he gained possession of it was not known to the com-

In re Smith.

mittee; that upon a demand for its return to the owner Smith refused to surrender it, setting up that it was obtained for the illegal purpose mentioned in the first paragraph. The details of the transaction, the bringing of the replevin action, and the attempted review of the judgment rendered in that action, together with the defenses, statements and arguments made by Smith in those proceedings, were alleged in substantially the language employed in the first paragraph, closing with the averment that notwithstanding the final judgment for the return of the diamond to its owner Smith still refused to give it up.

In the third paragraph it was averred that Smith brought an action in behalf of a client to recover an indebtedness for labor, and, after having been informed by both of the parties to the transaction that the debt had been paid and the controversy settled, he continued the litigation, introduced false testimony and made false statements, in the absence of the defendant, by which the justice of the peace before whom the case was tried was deceived, and was induced to enter a judgment against the defendant for ten dollars, when Smith well knew that the debt had been fully paid and satisfied.

After several motions directed at the accusation, and a motion for a change of venue, had been made and denied, the accused answered, denying the charges made against him, pleading in bar the statutes of limitation, and also a former adjudication of the charge as to the diamond, and setting forth his version of the transactions upon which the charges in the accusation were based. Much testimony was offered, upon which the court found that the charges were sustained, and entered a judgment revoking the license of the accused as an attorney and counselor at law, barring him from practicing his profession in the courts of the state, and striking his name from the roll of attorneys.

The first question raised on this appeal is, Was there

In re Smith.

error in refusing the accused's application for a change of venue? In an affidavit Smith stated that he believed the district judge entertained a feeling of ill will and prejudice toward him, citing rulings in a number of cases as indicating such a state of mind; that his apprehensions of prejudice were shared by his clients, and on that account he had been bringing most of his cases in the court of common pleas of Wyandotte county. The accused also stated in his affidavit that he acquitted the judge of any intentional misconduct or desire to wrong him, and that although the judge seemed not to be conscious of any prejudice toward him he believed the judge's state of mind was such that he could not give the accused a fair trial. Eliminating mere conclusions, and looking to the facts stated in the affidavit, it is clear that a change of venue would not have been justified. It frequently has been held that the venue should never be changed upon this ground unless the evidence clearly establishes the prejudice of the judge. The most that can be said of the showing in support of the application in this case is that it indicates a strong belief on the part of the accused that a prejudice existed against him in the mind of the judge. It is not enough that a party apprehends or believes that a judge is prejudiced, but it must satisfactorily appear that prejudice in fact exists. If mere fear of prejudice in a judge would warrant a change of venue the applications therefor would be numerous. The rule established by the statute and the decisions relating to changes of venue on account of the prejudice of the judge makes it clear that no error was committed in denying the accused's application. (*City of Emporia v. Volmer*, 12 Kan. 622; *The State v. Bohan*, 19 Kan. 28, 50; *Protective Union v. Gardner*, 41 Kan. 397, 401, 21 Pac. 233; *The State v. Grinstead*, 62 Kan. 593, 608, 64 Pac. 49; *The State v. Stark*, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910, 88 Am. St. Rep. 251; *The State v. Parmenter*, 70 Kan. 513, 79 Pac. 123.)

In re Smith.

It is next contended that some of the charges against Smith do not fall within the causes for disbarment named in the statute. As will be observed, the statute does not provide that the only causes for which the license of an attorney may be revoked or suspended are those specified in it, nor does it undertake to limit the common-law power of the courts to protect themselves and the public by excluding those who are unfit to assist in the administration of the law. It merely provides that certain causes shall be deemed sufficient for the revocation or suspension of an attorney's license. (Gen. Stat. 1901, § 398.) In the early case of *Peyton's Appeal*, 12 Kan. 398, 404, it was held that this statute is not an enabling act, but that the power of the court to exclude unfit and unworthy members of the profession is inherent; that "it is a necessary incident to the proper administration of justice; that it may be exercised without any special statutory authority, and in all proper cases, unless positively prohibited by statute; and that it may be exercised in any manner that will give the party to be disbarred a fair trial and a full opportunity to be heard." If there is authority in the legislature to restrict the discretion of the courts as to what shall constitute causes for disbarment, or to limit the inherent power which they have exercised from time immemorial, it should not be deemed to have done so unless its purpose is clearly expressed. It is generally held that the enumeration of the grounds for disbarment in the statute is not to be taken as a limitation on the general power of the court, but that attorneys may be removed for common-law causes when the exercise of the privileges and functions of their high office is inimical to the due administration of justice. (*Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100; *In re Norris*, 60 Kan. 649, 659, 57 Pac. 528; *Boston Bar Association v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *In the Matter of Mills, an Attorney*, 1 Mich. 392; *The State, ex rel.*,

In re Smith.

v. Laughlin, 10 Mo. App. 1, 31 S. W. 889; *State, ex rel., v. Harber et al.*, 129 Mo. 271, 31 S. W. 889; *State, ex rel., v. Gebhardt*, 87 Mo. App. 542; *In re Boone*, 83 Fed. 944; 4 Cyc. 905, 906.)

The nature of the office, the trust relation which exists between attorney and client, as well as between court and attorney, and the statutory rule prescribing the qualifications of attorneys, uniformly require that an attorney shall be a person of good moral character. If that qualification is a condition precedent to a license or privilege to enter upon the practice of the law, it would seem to be equally essential during the continuance of the practice and the exercise of the privilege. So it is held that an attorney will be removed not only for malpractice and dishonesty in his profession, but also for gross misconduct not connected with his professional duties which shows him to be unfit for the office and unworthy of the privileges which his license and the law confer upon him. (*Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; *Ex parte Burr*, 4 Fed. Cas. [No. 2186] 791, 1 Wheel. Crim. Cas. [N. Y.] 503; *In re O——*, 73 Wis. 602, 42 N. W. 221; *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555; *O'Connell, Petitioner*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; *Darmenon's Case*, 1 Mart. [La.] 129; *In re John Percy*, 36 N. Y. 651; *Penobscot Bar v. Kimball*, 64 Me. 140; *In re Wellcome*, 23 Mont. 450, 59 Pac. 445; *In re Weed*, 26 Mont. 507, 68 Pac. 1115; *Cohen v. Wright*, 22 Cal. 293; *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407; *Jones's Case*, 2 Pa. Dist. Ct. 538; *State, ex rel., v. Byrkett*, 4 Ohio Dec. 89; 4 Cyc. 910; 3 A. & E. Encycl. of L. 302.)

The accused was charged with professional misconduct, and also with misconduct not directly connected with his professional duties; but all of the charges related to the administration of justice, and seriously affected his professional and personal integrity. Although the charges involve moral turpitude, it is not

In re Smith.

necessary to a disbarment that there should have been a conviction. (*Ex parte Wall*, 107 U.S.265, 2 Sup. Ct. 569, 27 L. Ed. 552; *State, ex rel. Hartman, v. Cadwell*, 16 Mont. 119, 40 Pac. 176; *The State, ex rel. McCormick, v. Winton*, 11 Ore. 456, 5 Pac. 337, 50 Am. Rep. 486; *Perry v. The State*, 3 G. Greene [Iowa], 550; *Watson v. Citizens' Savings Bank*, 5 S. C. 159; *In re Samuel Davies*, 93 Pa. St. 116, 39 Am. Rep. 729; *Gates's Case*, 1 Pa. Co. Ct. 236.) Even an acquittal upon a criminal charge does not prevent the disbarment of an attorney, where it clearly appears that the misconduct under investigation rendered him unfit to be entrusted with the powers and duties of his profession. (*The People v. Mead*, 29 Colo. 344, 68 Pac. 241.)

It is contended that the proceeding was barred by some statute of limitation, but the accused points out no particular limitation applicable to cases of this character. Staleness in a charge against an attorney might prevent its being considered, because an unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure the witnesses or the testimony which would have been available at an earlier time to meet such charge; but the statute of limitations itself is no defense to such a proceeding. (*In re Elliott, ante*, p. 151; *In re Lowenthal*, 78 Cal. 427, 21 Pac. 7; *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33; *In re Weed*, 26 Mont. 507, 68 Pac. 1115; *United States v. Parks*, 93 Fed. 414; 4 Cyc. 914, 915.) It cannot be said that the charges in the present case have become stale, nor that there has been an unreasonable delay in presenting them to the court.

The accused urges as a defense that a former inquiry as to his professional standing and conduct bars the maintenance of this proceeding. In 1901 complaint as to his misconduct was made to the court, and, among other things, the diamond transaction was mentioned. The court appointed a committee to investigate the charges, and report the results, with recommendations.

In re Smith.

The committee made an extended inquiry, reported that the charges presented were not true, and their report, which was not preserved, was approved by the court, and it was ordered that the petition for disbarment be denied. The argument is that as the misconduct in respect to the diamond was included in the complaint, brought to the attention of the committee, and the committee's report was acted upon by the court, it is not open to further consideration. The action taken in that preliminary investigation by the committee, although approved by the court, was in no sense an adjudication. In the first place it appears that the diamond transaction was not in fact investigated. At that time it was the subject of inquiry in the replevin action heretofore mentioned, and hence the committee concluded to leave it out of consideration. Again, the investigation appears to have been preliminary, and only for the purpose of determining whether a formal accusation should be filed and the appellant cited to appear and make answer to the charges of misconduct. Like action was taken in the present case, for it appears that the accusation was not filed until a committee of the Wyandotte county bar had inquired into the charges and recommended that further proceedings be taken. This is not an uncommon practice, especially where the court is not satisfied that the charges made are well founded, or where it has not sufficient time to make the necessary inquiry in order to determine whether the attorney should be cited before the court to answer and defend.

There is a further reason why the action taken cannot be considered as a binding adjudication. Charges of this character cannot be tried by a committee, nor can the functions of the court in this respect be delegated to any one else. The statute is specific, and expressly places this responsibility upon the court itself. It provides: "To the accusation he may plead or demur, and the issues joined thereon *shall in all cases be tried by the court*, all the evidence being reduced to

writing, filed and preserved." (Gen. Stat. 1901, § 401.) It was the evident legislative purpose that in cases in which the honor and dignity of the court are involved, and which so seriously affect one of its attorneys, the court itself should be the trier of both the facts and the law. In Colorado it is held that the testimony in such a case may be reported by a referee (*The People v. Mead*, 29 Colo. 344, 68 Pac. 241), but in a number of states it is ruled that not only should the judge make the findings of fact and law, but, also, that the witnesses should be examined in the presence of the court. (*The State of Florida, ex rel., v. Jesse J. Finley*, 30 Fla. 325, 11 South. 674, 18 L. R. A. 401; *In the Matter of Albert L. Chandler*, 105 Mich. 235, 63 N. W. 69; *In the Matter of an Attorney*, 83 N. Y. 164, 23 Alb. L. J. 129; *In the Matter of ———, an Attorney*, 86 N. Y. 563.) In the investigation of the accused in 1901 there was certainly no trial by the court, and hence no adjudication. The testimony in the record makes it clear that such inquiry as the committee made was only preliminary, that the transactions involved here were not in fact considered by the committee, and that there has never been a previous trial by the court of the charges now under consideration.

There is complaint of inconsistency in the charges contained in the accusation, and a contention that the prosecuting committee should have been required to elect whether it would stand upon the first or second count. Both of these counts related to the conduct of the accused in respect to the diamond. In the first it was charged that money and a diamond were given to, and accepted by, the accused as a bribe to assist in defeating the ends of justice, and that when the question of possession and ownership of the diamond was presented to the court he pleaded his own immoral and illegal acts to defeat a recovery. In the second count it was alleged that the committee was unable to state the exact manner in which the accused gained possession of the diamond, but that he unlawfully refused to

give it up, and when proceedings were brought for its recovery he set up that the money was paid and the diamond delivered for the immoral purpose related in the first count. It is manifest that the complaint was framed to meet the exigencies of the proof. The proceeding is not criminal, and the formal and technical requirements of criminal pleading are not necessary in an accusation. (*In re Burnette*, ante, p. 609.) In criminal cases, however, the pleader is permitted to charge the same offense in several counts, in order to meet the requirements of the evidence. While formal and technical pleading is not essential to this proceeding, it is important that the charges against an attorney shall be so specific as fairly to inform him of the precise nature of the misconduct with which he is accused. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated or whether they are stated in one or two paragraphs is not of great importance. In any event the penalty can be no more than disbarment. So, in this case, the accused was notified that the committee would endeavor to prove that the money and property were offered to, and accepted by, him on the condition that he would either testify falsely or would assist in defeating justice by absenting himself so his testimony could not be had, and, if they failed in establishing that, that they would attempt to show that however he may have acquired the possession of the diamond he had at least stated and pleaded that it was given to him for the immoral and illegal purpose stated. The accused could not have been misled as to the nature of the misconduct charged against him, and we think no error was committed by the court in refusing either to quash the charges or to require an election by the committee.

Little need be said as to the sufficiency of the proof upon which the judgment of disbarment rests. Although the proceeding is not criminal, it is of such a nature, and the judgment of disbarment is so severe

In re Smith.

and so direful in its results to an attorney, that something more than a mere preponderance of proof is necessary. A judgment deprives an attorney of an office, of a means of livelihood, and to a great extent of his good name, and should only be rendered upon clear and satisfactory legal proof. The evidence in the record appears to be sufficient to meet the strictest requirement in this respect. Indeed, the accused, in statements, pleadings and arguments seriously made in courts, seems to have admitted much of the misconduct alleged against him. His recital of the negotiations for the giving of false testimony by him in court, or for the evasion of a subpoena so that his testimony as to the real facts in the case could not be obtained, betrays a moral obliquity and an utter lack of appreciation of the dishonesty of his acts. The explanation that he took money and property tendered as the price of his dishonor, expecting later to make an exposure of the man who bought him, if it had been believed by the trial court, does not go far toward exculpation. Instead of resenting the corrupt offer, the money was accepted and the diamond securing a further payment was received and kept, and when the owner of the diamond brought replevin for the recovery of his property the accused set up the immorality of the transaction and his own shame to defeat the action. The testimony showing both moral and professional delinquency was such that the duty of the trial court was clear, and no other course was open than the revocation of the abused license. An attorney is admitted upon a satisfactory showing of his good character and fitness to be an officer of the court. He is afterward required to maintain the same ethical standard, and is only entitled to hold the high office of "minister of the law" during good behavior. The proofs of misbehavior and of moral and professional delinquency are so clear that there appears to be no escape from the unpleasant duty of affirming the judgment of disbarment.

All the Justices concurring.

OPINIONS PER CURIAM.

ERIC BLOMBERG *et al.* v. FRANK J. FAULKNER, *as*
Administrator, etc.

No. 14,407. (83 Pac. 1115.)

PRACTICE, DISTRICT COURT—*Reopening Case.* It was held that an application to have a case opened after judgment to permit defendants to make a defense therein was properly denied.

Error from Marshall district court; SAM KIMBLE, judge. Opinion filed February 10, 1906. Affirmed.

Isaac A. Rigby, for plaintiffs in error.

E. A. Berry, and *Gregg & Gregg*, for defendant in error.

Per Curiam: The plaintiffs in error prosecute this proceeding to reverse an order of the district court refusing to open the case, in which a judgment had been rendered against them, that they might have another opportunity to make a defense therein. The action was on a promissory note bearing the signature of both of the defendants. Summons was properly served upon both, and they appeared and participated in the trial. The judgment was rendered May 7, 1903, and the application to have it set aside was filed October 6, 1903. The application states no defense to the action. It states no reasons why the court should open the case and permit the defendants to relitigate the questions.

The order of the court denying the application of the plaintiffs in error is affirmed.

URIAS BREWER V. GEORGE H. MOYER *et al.*, as
Partners, etc., et al.

No. 14,453. (84 Pac. 719.)

1. PRACTICE, SUPREME COURT — *Assignments of Error*. Matters passed upon by the trial court when considering a motion for a new trial were held not reviewable where the conclusion reached by the trial court is not assailed.
2. ——— *Amendment of Petition in Error*. Leave to amend a petition in error by adding new matter denied because the time within which errors in the case might have been presented had expired.

Error from Franklin district court; CHARLES A. SMART, judge. Opinion filed February 10, 1906. Affirmed.

Gamble & Costigan, for plaintiff in error.

Pleasant & Pleasant, and *Benson & Harris*, for defendants in error.

Per Curiam: The errors assigned in this proceeding relate to matters passed upon by the trial court when the motion for a new trial was under consideration. The conclusion of the trial court respecting them reached at that time is not assailed, and hence, under the well-established rule, this court will not now examine them.

The motion for leave to amend the petition in error is denied because the time within which errors in the case might have been presented to this court has expired. (*Crawford v. K. C. Ft. S. & G. Rld. Co.*, 45 Kan. 474, 25 Pac. 865; *Cogshall v. Spurry*, 47 Kan. 448, 28 Pac. 154.)

If the petition in error contained a defective, informal or incomplete assignment relating to the conduct of the trial court in denying the motion for a new trial the charge might be made definite, formal, and complete, but there is a total absence of anything by which to amend. Therefore the judgment of the district court is affirmed.

MARY C. BILLINGS V. THE KANSAS CITY-LEAVEN-
WORTH RAILROAD COMPANY.

No. 14,485. (88 Pac. 1115.)

1. DAMAGES — *Death by Wrongful Act — Evidence.* Where an ordinance required railroad-tracks to be constructed level with established street grades, but there was no proof of the violation of the ordinance, it was held not error, in a personal-injury case, to exclude testimony that defendant's track was above the surface of the street.
2. ——— *Violation of Speed Ordinance.* The provisions of an ordinance regulating the speed at which cars should be operated were said to refer to ordinary operation, and not to exceptional acts in clearing the tracks of snow.

Error from Leavenworth district court; JAMES H. GILLPATRICK, judge. Opinion filed February 10, 1906. Affirmed.

Fenlon & Fenlon, and *Waggener, Doster & Orr*, for plaintiff in error.

Atwood & Hooper, for defendant in error.

Per Curiam: The verdict of the jury was against Mary C. Billings, who claimed damages from the Kansas City-Leavenworth Railroad Company, now known as the Kansas City Western Railroad Company, for the death of her son, who was killed in a railway accident. The offer of testimony to the effect that the track of the railway was above the surface of the street was not material, and its exclusion was not error. The ordinance of the city required that the tracks of the railway should be constructed at the same level as the established grades of the street, but as there was no testimony of the violation of that ordinance that question was not in the case. None of the rulings upon the admission of testimony appear to be prejudicial error, nor can we say that the remarks made by the trial judge of which complaint is made furnish a ground for reversal. The instructions ap-

pear to have fairly presented the case to the jury. The matter of excessive speed was submitted, and the jury were rightly told that the provisions of the city ordinance as to the speed at which cars should be operated had reference to the ordinary operation, and had no application to the exceptional acts of the company in clearing its tracks of snow. An examination of the criticisms of the instructions given and refused shows that no material error was committed in charging the jury, nor is any reason seen why the motion for a new trial should have been allowed.

The judgment is affirmed.

THE COFFEYVILLE GAS COMPANY V. H. C. DOOLEY
et al., as Partners, etc.

No. 14,466. (84 Pac. 719.)

PRACTICE, SUPREME COURT—*Assignments of Error—Motion for a New Trial.* Consideration of questions arising upon the trial refused because the petition in error did not assign as error the denial of a motion for a new trial.

Error from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed February 10, 1906. Affirmed.

Ziegler & Dana, and Montgomery & Montgomery,
for plaintiff in error.

S. H. Piper, and S. J. Osborn, for defendants in error.

Per Curiam: The defendants in error brought this action to recover for legal services alleged to have been performed by them for the Coffeyville Gas Company upon its request. The defendant as an answer filed

Reynolds v. Dunlap.

its general denial. Judgment was rendered for the plaintiffs.

The petition in error does not assign as error the denying of the defendant's motion for a new trial; therefore no questions arising upon the trial of the cause can be considered by this court. (*Struthers v. Fuller*, 45 Kan. 735, 26 Pac. 471; *Dryden v. C. K. & N. Rly. Co.*, 47 Kan. 445, 28 Pac. 153; *National Bank v. Jaffray*, 41 Kan. 691, 19 Pac. 626; *Carson v. Funk*, 27 Kan. 524; *Clark v. Schnur*, 40 Kan. 72, 19 Pac. 327; *Binns v. Adams*, 54 Kan. 615, 38 Pac. 792; *Cogshall v. Spurry*, 47 Kan. 448, 28 Pac. 154; *City of McPherson v. Manning*, 43 Kan. 129, 23 Pac. 109.)

The errors assigned raise questions arising upon the trial and cannot be considered by this court.

The judgment is affirmed.

W. H. REYNOLDS V. E. P. DUNLAP.

No. 14,467. (84 Pac. 720.)

1. **MALICIOUS PROSECUTION—Instructions.** It was said that an instruction that actions for malicious prosecution have never been favored would have been erroneous.
2. ——— **Probable Cause.** What is, and what is not, the test of probable cause discussed.
3. ——— **Damages — Evidence.** The failure of a party to secure his release upon his own recognizance was said not to prove conclusively that he attached small importance to his arrest or to deprive him of the right to damages on the ground that he did not consider himself injured.

Error from Norton district court; ABEL C. T. GEIGER, judge. Opinion filed February 10, 1906. Affirmed.

E. D. McKeever, and *L. H. Wilder*, for plaintiff in error.

C. D. Jones, and *J. L. McPheely*, for defendant in error.

Per Curiam: The court has examined each assignment of error made in this proceeding, and after a consideration of the entire case is unable to declare that prejudicial error was committed. Many of the specifications are ashes from which the heat of the fire of the trial has subsided. Such are those relating to leading questions, evidence merely immaterial, and instructions refused in form but given in substance. Most of the testimony assailed is not, when fairly considered, open to criticism. Standing alone, a few answers appear to be improper; but the entire body of the evidence is such that the verdict and judgment ought not to be set aside on account of the occasional infraction of an arbitrary rule.

It would have been error to have told the jury that actions for malicious prosecution have never been favored. Conduct sufficient to excite a well-grounded suspicion in men unskilled in technical rules of law is not the test of probable cause. The jury should not allow for the prejudice, partiality and excitement of a person instituting a prosecution in which he is interested in determining his liability. The standard is that which a reasonably prudent man would do. The fact that a person arrested did not secure his release upon his own recognizance does not as a matter of law indicate that he attached small importance to his arrest or incarceration, or deprive him of the right to damages on the ground that he did not consider himself injured. Instructions embodying these misstatements of the law were rightfully refused, and all other instructions asked were either given in substance or properly refused. Considered separately, one or two instructions given seem to be brief; but this is probably a matter for commendation. When all the instructions given are read together they fairly present the law of the case.

Upon the whole the parties appear to have been

Bishop v. Railway Co.

afforded a fair trial. A full publication of the views of the court upon each specific question raised would only encumber the reports, and it is sufficient to say that the judgment of the district court is affirmed.

JACOB BISHOP V. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

No. 14,475. (84 Pac. 718.)

RAILROADS—Injury by Fire. In an action for damages resulting from a fire started by defendant's engine, judgment for defendant affirmed.

Error from Stafford district court; **JERMAIN W. BRINCKERHOFF**, judge. Opinion filed February 10, 1906. Affirmed.

T. W. Moseley, for plaintiff in error.

William R. Smith, O. J. Wood, and Alfred A. Scott, for defendant in error.

Per Curiam: In this case a separate discussion of each of the twenty-seven errors assigned would extend the opinion of the court to an insufferable length, and it would then be of no assistance to the profession generally.

The chief ground of complaint is that the court gave undue prominence to certain statements made in connection with the defendant's charge that the plaintiff was guilty of contributory negligence. When these statements were first called to the attention of the court in the amended answer there was nothing about them to indicate that they might be prejudicial, and so far as the court could tell they might become material on the trial. Hence there was no error in allowing the amended answer to be filed or in refusing to strike out the matter of which complaint is made.

When the instructions were given the court did not, as the plaintiff urges, impose the matters referred to upon the jury as ingredients of negligence. The weight to be given to every item of evidence in the case was left to the jury. The jury were plainly told that the plaintiff had the right to use his premises for all lawful purposes, including those for which they were adapted, and the test of his conduct under every phase of the case was stated to be that which an ordinarily prudent man would have exhibited under the circumstances. This being true, assignments of error numbered 1, 2, 3, 11, 12, 13, 14 and 16 fail.

The nature of the defendant's duty under the circumstances of the case was fully and accurately explained, and the evidence was such that this court is unable to discover in what manner the jury would have been aided by reading to them the theoretical proposition of law stricken from instruction No. 8. The modification of the instruction is readily distinguishable (*Campbell v. Fuller*, 25 Kan. 723), and the plaintiff has lost nothing by reason of the court's conduct respecting it. The plaintiff presents conflicting theories in reference to this subject, but none of them is valid, and assignments of error numbered 6, 7, 8, 9 and 10 are not well taken.

Instructions numbered 14 and 18 correctly state the law, and the jury may have believed from all the evidence that the plaintiff did not exercise due care notwithstanding his negotiations with the defendant respecting the plowing of fire-guards. It was not erroneous for the court to refuse the plaintiff's oral request for instructions. Instruction No. 25 was properly given, and as it appears in the record is duly identified. This disposes of all the remaining assignments of error except those which are formal, and those numbered 4 and 5, which do not comply with rule 10 of this court.

The judgment of the district court is affirmed.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY V. H. C. WEIKAL.

No. 14,498. (84 Pac. 720.)

RAILROADS—*Injury to Employee—Assumption of Risk.* Under the facts it was held that plaintiff, who was a machinist's helper and was injured by a chip which flew from a steel chisel, assumed the risk of his employment; and as he was a man of maturity and intelligence, who knew the danger, the omission to warn him thereof was not culpable negligence.

Error from Kingman district court; PRESTON B. GILLET, judge. Opinion filed February 10, 1906. Reversed.

William R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error.

C. W. Fairchild, for defendant in error; *J. F. Conly,* of counsel.

Per Curiam: While H. C. Weikal was helping Walter Moyer, a machinist, to furrow out a key-seat in a steel shaft of hoisting machinery at a coal-chute he was struck in the eye by a chip which flew from the chisel, and which destroyed the sight of the eye. It occurred in the night-time, while Weikal was holding a torch for the machinist. He charged that suitable light was not furnished; that the tools used were defective; that the machinist was negligent in the use of the tools; that the place was not a suitable one in which to work; and that he was not warned of the danger to which he was exposed.

The plaintiff's testimony does not establish liability. The machinist was competent, and there was no defect in the tools used. It was a proper place to do the work, unless the light was insufficient, and it does not appear that the absence of better light affected the case. Weikal relied principally upon the failure of his employer to instruct or inform him of the danger

73	763
677	146
77	648

Railway Co. v. Weikal.

of working in that place. This omission cannot under the circumstances be regarded as culpable negligence of the railway company. He was a young man of intelligence and experience who had worked at that place for some time, and had been a helper for machinists for months, and the fact that chips or particles of steel would fly from a chisel could not have escaped his observation. In fact the testimony presented by him was to the effect that in cutting steel with a chisel chips fly in every direction. It is claimed that he did not appreciate the danger of working in that particular place at that time. He had worked on that job, however, the afternoon preceding the night of the injury. During the afternoon he used the sledge-hammer and struck the chisel which was held by the machinist most of the time. At night Moyer used the chisel and small hammer while Weikal stood behind him with the torch. The position occupied by Weikal at night was no closer to the work nor to danger than the one he was in during the day. The chips are said to have struck a gearing and rebounded, but it was not practicable to use a screen or other protection, and the gearing was in the same position at night that it was during the day. The danger from the flying chips was not latent, and there was neither immaturity nor lack of intelligence to prevent Weikal from comprehending the obvious risks of the work. It did not require any warning to acquaint him with the fact that chips would fly, and the testimony which he offered showed that any one of ordinary intelligence could not have failed to understand the risk. There was danger in the work, it was true, but it was an ordinary hazard of the business—one which was open and obvious, and which Weikal must be held to have assumed.

As the testimony did not show liability the judgment is reversed, and the cause remanded for further proceedings.

LEE H. HARRIS V. WILLIAM GIBSON, SR., *et al.*

No. 14,303. (83 Pac. 1116.)

1. **PARTNERSHIP — Accounting.** Findings of a court were said to amount to a finding that there had been an accounting and settlement of a partnership estate.
2. ——— **Review of Findings of Fact.** The rule that this court will not disturb a finding made upon conflicting evidence applied.

Error from Douglas district court; CHARLES A. SMART, judge. Opinion filed March 10, 1906. Affirmed.

R. E. Melvin, for plaintiff in error.

Bishop & Mitchell, for defendants in error.

Per Curiam: This suit was brought in the district court of Douglas county by the plaintiff in error against the defendants in error for the dissolution of a copartnership and for an accounting between the partners, consisting of the plaintiff and defendants. The pleadings in evidence show that on or prior to the 5th day of May, 1902, the partnership consisted of the plaintiff, the defendant William Gibson and his son, Lucien Gibson, and the court found that on that day the copartnership was dissolved, and that shortly thereafter Lucien Gibson died, his only heirs being his widow and minor son, who are defendants with William Gibson in this suit. The court also found, in substance, that an accounting was had between the parties; at least it must be said that the findings of the court of the amount of property owned by the partnership and the amount of indebtedness against the partnership, and that each partner had withdrawn his entire capital invested therein, with the order of the court appointing a receiver, the sale of all the partnership property by the receiver under the orders

Borders v. Carroll.

of the court, the confirmation of such sale, and the application of the proceeds to the payment of the debts, amounted to a finding that there had been an accounting and settlement of the partnership estate. While there is a conflict in the evidence, there is certainly sufficient evidence to sustain the findings and the judgment of the court; and we cannot weigh the evidence here.

The judgment is affirmed.

F. M. BORDERS, as Administrator, etc., v. A. CARROLL.
No. 14,317. (88 Pac. 1115.)

BANKS AND BANKING — Fraudulently Induced Sale of Stock — Punitive Damages. In an action for damages for fraud in inducing a sale of bank stock, where the court erred in including certain items in its computation of the value of the stock, the amount allowed in excess of the actual value of the stock was not permitted to stand as punitive damages.

Error from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed March 10, 1906. Reversed.

Kos Harris, and *Ed. T. Hackney*, for plaintiff in error.

W. W. Schwinn, for defendant in error.

Per Curiam: This is one of several actions originating in the purchase of stock in the Wellington National Bank by John T. Stewart while he was the president and manager of the bank. The sellers of the stock in each case claimed that Stewart, while president and in the actual management of the bank, fraudulently manipulated the assets and the books of the bank so as to cause the stock to appear to be of

much less than its actual value, for the purpose of deceiving the stockholders and inducing them to sell their stock to him for a sum greatly less than its true value. The plaintiffs in each of the actions sought to recover from Stewart the difference between what they received for the stock sold to him and its actual value when sold.

In this action, as in the others, the plaintiff recovered judgment. The defendant brings the case here alleging that the court erred in including certain items in its computation in determining the value of the stock at the time of the sale. In the case of *Stewart v. Smith*, 72 Kan. 77, 82 Pac. 482, these precise questions were involved, and it was held that such items should not have been included in making the estimate. For further facts of this case see *Stewart v. Smith*, *supra*.

In addition, it is now contended by the defendant in error that he was entitled to punitive damages on account of the fraud of Stewart, and, if it should be held that the items referred to should not have been included in estimating the value of the stock when Stewart purchased, that inasmuch as plaintiff was entitled to punitive damages the amount allowed by the court in excess of the actual value of the stock should be allowed to stand as such damages. The action was brought to recover the difference between what plaintiff received and the actual value of the stock, which is alleged to have been worth \$400 per share. The objectionable items were included for the purpose of fixing the value of the stock when sold, and not as punitive damages. There was no claim for punitive damages, and the court did not allow any.

The judgment of the court is reversed on the authority of *Stewart v. Smith*, *supra*, and the cause remanded.

W. W. ATKIN *et al.* v. THE WYANDOTTE COAL AND LIME COMPANY.

No. 14,845. (84 Pac. 1040.)

DEMURRER—*Action on a Surety Bond—Answer.* In an action on a surety bond for material furnished to a contractor to pave certain streets, a demurrer to the answer was held to have been improperly sustained.

Error from Wyandotte court of common pleas; WILLIAM G. HOLT, judge. Opinion filed March 10, 1906. Reversed.

Frank Hagerman, and *A. L. Berger*, for plaintiffs in error.

McFadden & Morris, for defendant in error.

Per Curiam: In this case the facts are substantially the same as those in the case of *Surety Co. v. Brick Co.*, *ante*, p. 196, except that in this case the court sustained a demurrer to the fifth count of the answer of defendants. In the other case plaintiff did not demur to this defense, and the only question remaining in this case, therefore, is whether the court should have sustained the demurrer to the fifth defense or fifth count of the answer, which set up as a defense that for the purpose of procuring signatures to the petition for paving, and to prevent competition in the prices charged for the brick used, the Diamond Brick and Tile Company secretly and fraudulently hired and paid numerous resident owners of the lots fronting upon the street to sign the petition, whereby there was procured what could not otherwise have been procured—a pretended majority of the feet fronting upon the street belonging to resident owners—and that the proceedings were absolutely void. It was also alleged that if the plaintiff sold any material to the contractor and delivered the same for the paving, such sale and delivery were made

Hurdle v. Railway Co.

with full knowledge of the facts set up in this count of the answer. For the same reasons stated in the case of *Surety Co. v. Brick Co.*, *supra*, we think this count of the answer stated a defense good against a demurrer.

The judgment is reversed.

EMMA HURDLE V. THE MISSOURI PACIFIC RAILWAY
COMPANY.

No. 14,368. (85 Pac. 287.)

DAMAGES—Death by Wrongful Act—Demurrer to Evidence. In an action for damages for a death by wrongful act it was held that the trial court erred in sustaining a demurrer to the plaintiff's evidence.

Error from Johnson district court; WINFIELD H. SHELDON, judge. Opinion filed March 10, 1906. Reversed.

Cook & Gossett, and *A. Smith Devenney*, for plaintiff in error.

Waggener, Doster & Orr, and *Humbert Riddle*, for defendant in error.

Per Curiam: The trial court was not warranted in sustaining the demurrer to plaintiff's evidence. There is testimony that Hurdle, the deceased, in going to and from his work had used a railroad velocipede on the railroad-track for years with the knowledge and consent of the company; that the engineer had some reason to believe that Hurdle would be upon the track about the time that he was run down and killed; that the engineer was looking along the track and must have seen Hurdle a distance of about 600 feet from the point of collision; and that the engineer did not give any signal or warning of approach until just before the collision.

Hurdle v. Railway Co.

Leaving out of consideration the character of Hurdle's license to run the velocipede over the track, whether he had a right to rely upon the giving of certain crossing signals, and whether Hurdle had reason to, or did, believe that the belated train had already passed, we still think the right of recovery was not a question of law for the court. Even if Hurdle was careless in going upon the track, it would be no excuse for the engineer recklessly to run him down. If the engineer saw Hurdle, and ran most of the intervening distance without giving warning or using the ordinary means to save his life, it was a reckless, wanton act, and the company cannot rely upon Hurdle's negligence to protect it from liability. It was admitted by the engineer that he was on the lookout, and that he saw Hurdle about a hundred yards away, when he sounded the whistle and applied the air-brake. Other witnesses say, however, that Hurdle was in sight of the engineer about twice that distance, and also that the engineer did not sound the whistle until about the time that the engine struck and killed Hurdle. If it be granted that the engineer blew the whistle about a hundred yards away, as he stated, there is still testimony to the effect that he must have run about 300 feet while in sight of Hurdle without giving any warning or taking any precautions to avert the injury. If that be true, his action may justly be characterized as recklessness. Had the warning been given when he was 600 feet away Hurdle might possibly have thrown himself from the track and saved his life.

Whether it was a reckless injury by the engineer, or whether recovery is barred because of Hurdle's own negligence, are questions for the determination of a jury. Viewing the testimony in the light most favorable to the plaintiff, and allowing all reasonable inferences in her favor, we think the demurrer to the evidence should have been overruled, and therefore the judgment of the court is reversed, and the cause remanded for further proceedings.

A. B. JONES *et al.* v. THE STATE OF KANSAS.

No. 14,501. (85 Pac. 302.)

APPEARANCE BOND—*Forfeiture.* After a plea of not guilty had been entered by counsel for defendant to an information charging the unlawful sale of intoxicating liquor the information was amended. Counsel for defendant declined to plead or answer to the amended information, and the court ordered defendant's non-appearance to be entered, and adjudged his recognizance forfeited. In an action on the bond the defendants demurred to the petition, and the demurrer was overruled. A judgment against the defendants was affirmed.

Error from Trego district court; JAMES H. REEDER, judge. Opinion filed March 10, 1906. Affirmed.

S. M. Hutzell, and *A. D. Gilkeson*, for plaintiffs in error.

I. T. Purcell, county attorney, *Lee Monroe*, and *E. P. Hotchkiss*, for The State.

Per Curiam: The county attorney of Trego county filed an information which charged "that on the 14th day of February, 1903, . . . one J. Q. Thompson, in a certain frame building situated on the main street of Collyer, in said county, . . . did then and there unlawfully sell and barter spirituous, malt, vinous, fermented and other intoxicating liquors" without a permit. Thereupon a warrant was issued, the defendant arrested, and he gave bond in the usual form for his appearance on the first day of the next term of the district court of Trego county to answer the charge. Court convened October 6, 1903. Counsel for the defendant appeared and entered a plea of not guilty, and demanded a trial. The defendant did not appear in person. The county attorney then asked permission to file an amended information containing two counts, which was granted, to which the defendant by his counsel objected and excepted. The amended

information contained the original count recopied, with the exception that in the original information the offense was charged to have been committed in a building "situated on the main street of Collyer, in said county," while the amended information in this respect stated that the offense was committed in a building "situated on the west side of a certain street sometimes called Main street, in the town of Collyer, in said county of Trego." The second count charged the defendant under the prohibitory law with maintaining a nuisance.

After the filing of the amended information the defendant's attorneys announced to the court that they would not and did not appear for the defendant to plead or answer to the said amended information; that they would appear and answer for him to the original information and none other. The court thereupon ordered the non-appearance of the defendant entered on the record and adjudged his recognizance forfeited. The cause was then continued for the arrest of defendant. Thereafter this action was brought upon the forfeited recognizance. The defendants demurred to the petition, which was overruled; and, the defendants not wishing to plead further, judgment was rendered against them for the amount of the face of the bond, to reverse which they prosecute error.

The defendant not having appeared either by counsel or in person to answer the charge in the amended information, it was the duty of the court to cause his non-appearance to be entered and to declare and enter a forfeiture of the recognizance. The petition contains all the facts and states a cause of action. The judgment of the district court is affirmed.

W. C. SMYSER *et ux.* v. D. J. FAIR.

No. 14,506. (85 Pac. 408.)

1. **CONTRACTS—Construction.** The rule that the law will not imply a relation between parties contrary to their agreement applied.
2. **NOTICE—Waiver.** It was said a party cannot be heard to say that a notice which he expressly waived was not given.
3. **PRACTICE, DISTRICT COURT—General Verdict.** In this case, if a general verdict was desired it should have been asked for before the jury were discharged.

Error from Reno district court; WILLIAM H. LEWIS, judge. Opinion filed March 10, 1906. Affirmed.

George A. Vandever, and *Frank L. Martin*, for plaintiffs in error.

Prigg & Williams, for defendant in error.

Per Curiam: In addition to the advisory findings of the jury the court made findings of its own, which bring to the support of the judgment all the facts and all the inferences of fact derivable from the evidence most favorable to the plaintiff, even although opposed by strong evidence to the contrary.

The findings of the jury themselves entirely preclude the notion that the attempted return of the windows can be tacked to the tender of the \$250 so as to make a legal tender of payment of the balance due the plaintiff. The transaction amounted to no more than a belated attempt to return damaged property to a vendor on the ground that it did not comply with the contract of sale.

The record contains ample evidence to support Fair's position that he was under no legal duty to receive and give credit for the windows when Smith brought them back, and Smyser is clearly chargeable with them if he is the principal debtor.

The evidence and findings are that Smyser was not

Case Co. v. Arnett.

a surety at all, but that he agreed to pay for the material for his house himself. The law will not imply a relation between parties contrary to their agreement covering the subject. (*Bank v. McIntosh*, 72 Kan. 603, 84 Pac. 535.) The case is quite like that of *Carney Bros. v. Cook*, 80 Iowa, 747, 45 N. W. 919, and bears no resemblance to *Fisher v. Stockebrand, Adm'r*, 26 Kan. 565.

Smyser cannot be heard to say that a notice was not given which he expressly waived, and if he desired a general verdict he should have asked for it before the jury to which he submitted his case were discharged.

The judgment of the district court is affirmed.

THE CRYSTAL CASE COMPANY V. EUGENE ARNETT.

No. 14,523. (85 Pac. 302.)

CONTRACTS—*Construction*. Certain letters construed and held to have established a contract.

Error from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed March 10, 1906. Reversed.

E. L. Foulke, Stanley & Stanley, and Hart & Koehler, for plaintiff in error.

Stanley, Vermilion & Evans, for defendant in error.

Per Curiam: This was an action brought by the plaintiff in error against the defendant in error to recover damages for the non-fulfilment in part of an alleged contract for the purchase of 100 show-cases, a part of the order having been delivered. The plaintiff introduced its evidence, rested its case, and the defendant demurred. The court sustained the demurrer, and, the plaintiff standing thereon, the court rendered judgment in favor of the defendant. The plaintiff brings the case here.

The evidence showed that the plaintiff had a factory where it manufactured show-cases, and also that it had its principal place of business at Alliance, Ohio. The principal question in the case for our decision is whether or not the following letters constituted a contract to sell and to purchase between the plaintiff and the defendant. Under date of March 26, 1901, the plaintiff, by its president, wrote the defendant as follows:

"We are in receipt of your esteemed favor of March 21, in which you state that you are in the market for a considerable number of show-cases. . . . In order that you may look into this matter somewhat, we are sending you under separate cover some cuts of our revolving show-cases, and we beg to state in this connection that the plan which you suggest—shipping out direct to the customer—is the one which we usually pursue, as we have found it to be very much more satisfactory in this, that it saves double handling and the expense thereto. In definite orders for 100, to be shipped from the factory within six months as you may direct, we will make you the following quotations:

Style A #1.....	\$15 00
Style B #1.....	9 00
Style A #1, without the hand-rail, which is the exterior means of revolving the inside of the case.....	12 00
Style B #1, without the hand-rail top, which is the exterior means of revolving the inside of the case.....	8 00
Copper oxidized pedestal, when desired, we furnish for	3 50"

Under date of May 15, 1901, the defendant wrote the plaintiff as follows:

"Back in March and April we had some correspondence with you relative to show-cases. I believe you quoted as follows:

Style #1, with hand-rail (A) and bronze pedestal.....	\$18 50
Style B #1, without hand-rail..	8 00

"Above prices f. o. b. cars, Alliance, Ohio.

"We now think of trying to sell a few of these cases and you may enter us for a hundred. We will pay for them as ordered out. Don't know just the proportion of each but presume about two of the B to one of the A. Will you please send us a small size (the smallest you have) cut of each style, and, if you have them so, prefer for them to show jewelry, but if not, we will take them and have plates made ourselves."

It is claimed on the part of defendant that because a letter from the plaintiff proposed to sell 100 cases "to be shipped from factory," whereas the defendant's letter in answer thereto stated "I believe you quoted as follows: . . . Above prices f. o. b. cars, Alliance, Ohio," that the answer did not constitute an acceptance of the offer as made, but attempted to modify it and accept it as modified. By the rules of construction of contracts, it was the duty of the court below and is the duty of this court to determine if possible what was the meaning of the parties, and if their minds met upon one meaning the letters constituted a contract; otherwise there was no contract.

We are authorized in determining this question to consider the subsequent actions of the parties. In the first place, it may be noted that the language of plaintiff's letter, if not ambiguous, was at least unusual. It is usual to speak of freight delivered upon and to be carried by the railroad as shipped. It is not usual to speak of goods delivered upon and carried by a dray as shipped, but the usual expression is carted or hauled. The defendant, it seems, recognized this ambiguity—if it may be so called—in the proposition, and interpreted it without an intention of modifying it. He says, in substance, I believe you quoted above prices f. o. b. cars, Alliance, Ohio. It is shown that the plaintiff either originally intended its quotation as interpreted by defendant or afterward accepted the defendant's interpretation, as it shipped a part of the goods on the order of the defendant on that basis. The part performance evidences no misunderstanding, but

is evidence of a complete understanding—a complete contract.

Some minor reasons for sustaining the judgment are discussed in defendant's brief which we have examined and do not find well sustained. The question whether or not there was a contract seems to have been the question upon which the case turned, and as we have concluded that there was a contract between the parties the ruling of the district court in sustaining the demurrer to plaintiff's evidence is reversed, and a new trial granted.

A. M. ROOT *et al.*, as Partners, etc., v. C. J. WOLFF.

No. 14,553. (84 Pac. 1134.)

PROMISSORY NOTE—Set-off. In an action on a note, to which defendants pleaded a set-off, judgment for plaintiff affirmed.

Error from Morris district court; OSCAR L. MOORE, judge. Opinion filed April 7, 1906. Affirmed.

Nicholson & Pirtle, for plaintiffs in error.

John Maloy, for defendant in error.

Per Curiam: In the action on the note defendants pleaded a set-off. In submitting the case the court in one instance stated that the defendants claimed a credit on the note. The credit was in fact claimed in the action by reason of an alleged set-off, the character of which was fully stated. Defendants did ask that the set-off should be applied on an acknowledged indebtedness, and therefore the statement that a credit was claimed on the note was not prejudicial.

No error was committed in placing the burden of proof on the defendants to establish the claimed set-off.

There is no good reason to complain of the rulings on the admission of testimony, nor in denying the motion for a new trial.

The judgment is affirmed.

ABBA CLAIR MCCREADY v. W. H. DENNIS *et al.*

No. 14,565. (85 Pac. 531.)

EJECTMENT—Pleadings. In an action of ejectment it was held that the pleadings put in issue the ownership of the property, and that therefore it was error for the court to render judgment on the pleadings, the issue being undetermined.

Error from Chautauqua district court; GRANVILLE P. AIKMAN, judge. Opinion filed April 7, 1906. Reversed.

J. B. Ziegler, and Keplinger & Trickett, for plaintiff in error.

W. S. Fitzpatrick, and Sproul & Van Tuyl, for defendants in error.

Per Curiam. This was the second trial of an action in ejectment. On motion therefor, the court rendered judgment for the defendants on the pleadings. This is assigned as error. The plaintiff in the action claimed to be the owner of the property in controversy and entitled to its possession. The defendants denied plaintiff's ownership, and in their cross-petition for affirmative relief alleged that one Amanda Miller was the owner of the property and that she had executed to them an oil-and-gas lease under which they were in possession, and they asked that the plaintiff's claim of ownership be canceled. To this cross-petition the plaintiff filed a general denial, and reaffirmed her ownership of the land.

These pleadings put in issue the ownership of the land as one of the material facts to be determined before the court could decide the ultimate rights of the parties. It was therefore error for the court, while this issue was undetermined, to render a judgment on the pleadings.

The motion to dismiss this proceeding is denied, the judgment reversed, and the cause remanded for further proceedings.

FRED ROBERTSON V. THE LOMBARD LIQUIDATION
COMPANY.

No. 14,568. (85 Pac. 528.)

1. **ANSWER—Amendment.** In an action of ejectment it was held not to have been an abuse of discretion for the court to allow an amended answer to be filed.
2. **TAX DEED—Description—Consideration—Interest.** A tax deed held to be good upon its face, the description being sufficient, and the consideration not excessive when interest is computed at the rate in force when the subsequent taxes were paid.

Error from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed April 7, 1906. Affirmed.

R. W. Turner, and *Fred Robertson*, for plaintiff in error.

Peters, Bowersock & Hall, and *E. P. Hotchkiss*, for defendant in error.

Per Curiam: This was an action in ejectment. Two errors are assigned: (1) In allowing an amended answer to be filed; (2) in holding the tax deed of the defendant valid.

The defenses set up in the amended answer did "not change substantially . . . [the] defense" which could have been made under the original answer. Hence there was no abuse of discretion in the allowance of the amendment. (Code, § 139; Gen. Stat. 1901, § 4573.)

The tax deed had been of record more than five years before the commencement of this action. It describes accurately the land taxed, and in describing the land sold says "the whole of the above-described property," and in the granting clause says "the real property last hereinbefore described." There is only one tract of land described. Its description is admitted to be accurate, and the references thereto are so direct and certain that there can be no mistake as to the land sold or

73 779
75 831

Burley v. Brown.

the land conveyed. This is sufficient. (*Cartwright v. Korman*, 45 Kan. 515, 26 Pac. 48.)

The deed shows that the land was sold on the first Tuesday in September, 1891, for the taxes of 1890, for \$10.83; that the holder of the tax-sale certificate paid the taxes of 1891—\$5.77; and that on July 22, 1895, the county clerk conveyed the land to such holder for \$32.05, being the "taxes, costs and interest due on said land for the years A. D. 1890 and 1891."

Chapter 110 of the Laws of 1893 changed the rate of interest from twenty-four per cent. to fifteen per cent. Of course this would not affect the rate of interest in this case. Assuming that the taxes for 1891 were paid by the holder of the certificate as soon as the same became delinquent, and computing interest at twenty-four per cent. on the two amounts to July 22, 1895, leaves less than fifty cents of the amount for which the conveyance was made to be accounted for in costs.

The judgment of the district court is affirmed.

J. M. BURLEY V. W. R. BROWN.

No. 14,569. (85 Pac. 527.)

1. **PARTNERSHIP—Dissolution—Suit upon the Settlement—Petition.** A petition to recover an amount agreed upon alleged that upon the dissolution of a partnership there had been a full and final settlement of the "business." An objection to evidence because the petition did not allege a settlement of the partnership affairs was held to be trivial.
2. ——— **Firm Obligations.** Upon the final settlement of partnership affairs a sum was found to be due to plaintiff, which defendant agreed to pay. In a suit for the amount it was held that plaintiff need not prove that the firm debts had been paid, although the petition so alleged.

Error from Cherokee district court; WILLIAM B. GLASSE, judge. Opinion filed April 7, 1906. Affirmed.

E. J. White, and S. C. Westcott, for plaintiff in error.
Sapp & Brown, for defendant in error.

Per Curiam: Brown sued Burley, alleging in his petition that a partnership existed between them, which was dissolved by mutual consent on January 1, 1904; that in July, 1904, there had been a full and final accounting and settlement of the business, and in the settlement there was found to be due to Brown from Burley the sum of \$852.36; that the debts of the partnership had all been paid; and that Burley refused to pay the amount agreed upon in the settlement. The answer was a general denial. Upon a trial before a jury plaintiff recovered a verdict and had judgment for the full amount, from which the defendant brings this proceeding in error.

It is urged that the court should have sustained an objection to the introduction of any testimony under the petition for the reason that the petition did not allege a settlement of the partnership affairs. This objection is trivial and depends upon whether the word "business" means affairs. The petition stated that they had a full and final accounting and settlement of their business up to a certain date. Plaintiff in error cites *Palm v. Poponoe*, 60 Kan. 297, 56 Pac. 480, which, however, upholds the theory upon which the petition was drawn. That case distinctly recognizes the well-settled rule that before an action can be maintained by one partner against another to recover as for a balance due upon an accounting there must have been an accounting or settlement and the amount due determined, which is just what the petition here alleged had been done.

The claim that the court should have sustained a demurrer to the evidence rests upon the contention that it was necessary for plaintiff to prove that there were no debts of the partnership outstanding. Plaintiff's evidence was silent as to this, although the petition alleged that the debts had been paid. As the

Burley v. Brown.

action here was based upon a settlement and agreement to pay, it was not necessary to establish the fact that the firm's debts had been paid. It was not an action for an accounting or a settlement of a partnership, but simply upon a contract to pay an amount agreed upon in a final settlement. The general denial raised no issues of fraud or mistake in the settlement, but merely denied the settlement.

We have examined the other errors complained of but find nothing substantial or prejudicial. The evidence clearly showed that these parties met day after day for months in a lawyer's office for the express purpose of arriving at a settlement of their affairs; that they had their papers and accounts with them, and frequently adjourned to meet and continue the attempt at a settlement; and there was the testimony of plaintiff, corroborated by other witnesses and circumstances, that a final settlement was agreed upon, and that defendant agreed to pay plaintiff the amount found to be due from him.

There was evidence sufficient to warrant the verdict and judgment. The judgment is affirmed.

THE A. J. HARWI HARDWARE COMPANY V. CONRAD
KLIPPERT *et al.*

No. 14,384. (85 Pac. 784.)

PRACTICE, SUPREME COURT—*Second Appeal—Law of the Case.*

The rule applied that where a case is brought a second time on error to this court the first decision will be deemed the settled law of the case, not merely as to all questions actually presented by counsel, but as to all questions existing in the record and necessarily involved in the decision.

Error from Brown district court; WILLIAM I. STUART, judge. Opinion filed May 12, 1906. Reversed.

Ryan & Ryan, W. W. Guthrie, and W. F. Guthrie,
for plaintiff in error.

James Falloon, for defendant in error Henry Reh.

Per Curiam: This is the second appeal of this case to this court. The facts are set forth in the former decision, *Harwi v. Klippert*, 67 Kan. 743, 74 Pac. 254. Every principle of law set forth in the present appeal was therein decided. The judgment in favor of the plaintiff in error was therein held valid and the order of the court below modifying the same set aside although negotiable promissory notes of Henry Reh were outstanding for the same indebtedness for which the judgment was rendered against him on his answer as garnishee. The situation is not changed by the subsequently occurring fact that the notes have been paid to the legal holder thereof.

“Where a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, and will not be made a subject of re-examination.

“This rule extends not merely to all questions actually presented by counsel, but to all questions existing in the record, and necessarily involved in the decision.” (*Headley v. Challiss*, 15 Kan. 602, syllabus.)

(See, also, *C. B. U. P. Rld. Co. v. Shoup*, 28 Kan. 394,

Railway Co. v. Fithian.

42 Am. Rep. 163; *Crockett v. Gray*, 31 Kan. 346, 2 Pac. 809; *The Western News Company v. Geo. O. Wilmarth*, 34 Kan. 254, 8 Pac. 104; 26 A. & E. Encycl. of L. 184.)

Of course this is a hardship on Reh, but it is no greater than the hardship usually incurred by any plaintiff who submits his cause to the decision of a court without pleading or setting forth some right of recovery which in fact he has, or which occurs to a defendant where he submits his defense to the decision of the court without pleading or setting forth some valid defense which he in fact has. When the court is the final trier of the facts and renders a valid judgment upon the facts as presented, and no effort is made to correct the error or omission while such cause is within the jurisdiction of the trial court, the party who erred to his own prejudice is remediless unless the matter omitted may be made the basis of an independent action.

The order of the district court is reversed, and the plaintiff in error restored to whatever it may have lost by reason thereof.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
v. W. C. FITHIAN.

No. 14,587. (85 Pac. 594.)

RAILROADS—Injury by Fire. A railway company held liable for the burning of a building through the negligence of its employees in setting out a fire to clear the company's right of way.

Error from Lyon district court; **FREDERICK A. MECKEL**, judge. Opinion filed May 12, 1906. Affirmed.

John Madden, W. W. Brown, and L. B. Kellogg, for plaintiff in error.

Buck & Spencer, for defendant in error.

Decatur County v. Leaman.

Per Curiam: An ice-house was burned through the negligence of the employees of the railway company, who were burning and clearing the right of way. It was not an accidental fire, but was purposely set out under orders of a foreman and to carry out the company's scheme of clearing the right of way and protecting it against loss. The fire was set out just beyond the right of way and within a few feet of the ice-house, but the company cannot escape liability on that account. Because of the direction of the wind the men thought it to be more practicable to burn from the outside toward the railroad-track, instead of from the track outward, but it proved to be a careless and disastrous plan. The fire was started near the right of way by employees of the company, under orders of its representative, and for its own benefit. For their negligence the company is responsible.

The question of contributory negligence was properly submitted to and settled by the jury. We find no error in the instructions, or other rulings, and therefore the judgment is affirmed.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF DECATUR V. J. B. LEAMAN.

No. 14,592. (85 Pac. 590.)

FEES AND SALARIES—*Deputy Sheriffs.* A sheriff held not entitled to recover compensation for the service of deputies in excess of that authorized by the statute.

Error from Decatur district court; ABEL C. T. GEIGER, judge. Opinion filed May 12, 1906. Reversed.

L. M. Parker, county attorney, for plaintiff in error;
G. Webb Bertram, of counsel.

W. S. Langmade, for defendant in error.

Per Curiam: J. B. Leaman held the office of sheriff of Decatur county for a period of five years, from January 8, 1900, to January 9, 1905. Two days before his term of office expired he filed a claim against the county for \$1250 for deputy hire at the rate of \$250 for each of the five years. The claim was disallowed by the board of commissioners, and on appeal to the district court the cause was tried by the court without a jury and Leaman was given judgment for \$750, the court holding that the claim for deputy hire for the first two years was barred by the statute. The county brings error.

It appears from the evidence that during the five years Leaman was sheriff he presented claims against the county for the services of himself and deputy for each day and mileage for each mile either he or his deputy traveled, and these claims were from time to time allowed.

The peculiar claim is advanced by defendant in error in support of the judgment in this case that the conditions existing in Decatur county at the time he was so unfortunate as to be called upon to fill the office of sheriff were such as to authorize a special dispensation of justice. It appears that the court-house, sheriff's residence and jail were all separated by a distance of several blocks, requiring extra help and assistance in caring for the prisoners. In addition, the sheriff's own testimony discloses that the earnings of his office were small during the years he held it. In some years he thinks he only averaged about \$900 as receipts. A former sheriff who immediately preceded him in the office testified that his earnings were on an average of \$1700 a year.

Authorities are cited to the effect that when a party knowingly appropriates to its own use the property or services of another, there is an implied contract to pay for the same. It is argued that the county appropriated to its use the services furnished by the sheriff

Morrill Township v. Fletchall.

and should allow him for it. The claim is not based upon any testimony that in each year defendant in error hired a deputy and paid him \$250. The amount claimed for each year appears to be a sort of estimate on the part of the sheriff that this amount would about square him with the county for that year.

The statute fixes the fees and allowances of sheriffs, and we know no way he can avoid rendering services to the county for an inadequate compensation except by resigning the office when dissatisfied with the emoluments fixed by the statute. To uphold this judgment would open the door to the allowance by the boards of county commissioners of innumerable claims which might with as much propriety be presented by county officers after their terms had expired for additional compensation for services claimed to have been rendered. There is no law that we know of or have been referred to which would sustain the judgment, and it is therefore reversed and remanded, with instructions to enter judgment for defendant below for costs.

MORRILL TOWNSHIP V. CHARLES E. FLETCHALL *et ux.*

No. 14,595. (85 Pac. 753.)

1. DAMAGES—*Death of a Child—Defective Highway.* A judgment awarding damages to parents for the death of a child caused by a defective highway affirmed.
2. COSTS—*Claim Not Presented to Township Board.* It was said that the plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action.

Error from Brown district court; WILLIAM I. STUART, judge. Opinion filed May 12, 1906. Affirmed.

James Falloon, for plaintiff in error.

Samuel F. Newlon, for defendants in error.

Per Curiam: The plaintiffs' children, one ten and the other five years of age, were sent by their parents to a neighboring town in a one-horse conveyance. While the older son was driving along the public highway the vehicle was turned over into a ditch, the younger child falling under it, in consequence of which he died. The parents recovered judgment in this action for damages against the township for the loss of their child on the grounds of negligence on the part of its officers in permitting the highway, at the place where the child was killed, to remain in such condition as to be dangerous to public travel.

An examination of the errors assigned discloses nothing prejudicial to the township. The contention is made that the court should have taxed the costs to the plaintiffs because there is no evidence that the plaintiffs' claim was presented to the township board for allowance before the action was commenced. This cannot be sustained. Counsel cite no such statutory requirement, and we know of none. The statute which requires all claims against cities to be presented to the council for allowance or costs shall not be awarded in an action thereon does not apply to actions against townships. In the absence of such a statute the plaintiffs are entitled to their costs.

The judgment is affirmed.

W. D. COX *et al.*, as Partners, etc., v. THE CITIZENS' STATE BANK.

No. 14,613. (85 Pac. 762.)

1. **NEGOTIABLE INSTRUMENTS**—*Presentation and Demand.* When presentation and demand of payment of a bank-check must be made discussed.
2. ——— *Delay—Rights of Drawer.* Delay in forwarding and presenting a check, if no loss occur to the drawer, held not to be a defense against a recovery by a *bona fide* holder.

Error from Allen district court; OSCAR FOUST, judge.
Opinion filed May 12, 1906. Affirmed.

Chris Ritter, and *C. J. Peterson*, for plaintiffs in error.

Amos & Orton, for defendant in error.

Per Curiam: It is the law that checks are payable instantly on demand, but it is not the law that payment of a check must be demanded instantly. Granting that a check has some features of a bill of exchange under the statutes of this state, it need not be presented until the day after it is given if the party receiving it and the bank upon which it is drawn are in the same place. If they are not in the same place, it is only necessary that the check be put in course of collection within the time otherwise allowed for presentation. It cannot be said to be due until demand for payment is made.

If not forwarded and presented within the time allowed by the rules of commercial law the drawer must show the delay caused him to suffer loss before he can defeat recovery by a *bona fide* holder. The same rule holds regarding protest and notice of non-payment. (*Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, and cases there cited.)

The statement in the defendants' answer that the check was due the day it was drawn could not be true,

and no facts showing a violation of the rule of diligence in presenting the check and subsequent damage are pleaded.

In suing upon the check the indorsee had the right to disregard or cancel all indorsements carrying the check forward from it to the drawee. The defendants' remedy is against the party defrauding them, and not against the party who in good faith cashed their check.

The judgment of the district court is affirmed.

73	790
81	302

THE STATE OF KANSAS V. FRANCIS M. ROWLAND.

No. 14,683. (84 Pac. 1185.)

CRIMINAL LAW—Rape. A judgment of conviction for carnally knowing a girl under eighteen years of age affirmed.

Appeal from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed May 12, 1906. Affirmed.

C. C. Coleman, attorney-general, and C. L. Aikman, county attorney, for The State.

E. N. Smith, for appellant.

Per Curiam: The state's motion to dismiss is denied, and the appellant is allowed to amend his assignments of error. This done, he still presents for consideration nothing prejudicial to his rights. The words "violently" and "forcibly" do not change the fact that the victim of appellant's crime was only sixteen years old. If the information lacked certainty it should have been attacked by motion.

The little girl's story to her grandmother was timely, and her reasons for not divulging the previous conduct of the appellant, her father, were pertinent. The appellant himself invited the explanation of the witness,

The State v. Welfelt.

Turner, that he would not allow the appellant's father to talk to the little girl because he was offering money to stifle prosecution. The remark of the court to the state's attorney postponing the introduction of anticipatory testimony was not improper, and the evidence of the doctor who examined the child was competent, relevant, and very material.

The instructions to the jury were correct, and the judgment is affirmed.

THE STATE OF KANSAS, *ex rel. C. C. Coleman, as
Attorney-general*, v. ADAM O. WELFELT.

No. 14,851. (85 Pac. 583.)

PRACTICE, SUPREME COURT — *Proceeding to Forfeit Office of Sheriff*. An original proceeding to remove a sheriff from office dismissed because the controversy could better be heard in the district court.

Original proceeding in *quo warranto*. Opinion filed May 12, 1906. Dismissed.

C. C. Coleman, attorney-general, and Torrance & Bloss, for The State.

C. T. Atkinson, and G. H. Buckman, for defendant.

Per Curiam: This is an original proceeding brought in this court for the purpose of removing the sheriff of Cowley county from his office for failure properly to perform its duties. A motion to dismiss is made upon the ground that it might more appropriately be brought in the district court. The reason given for invoking the action of this court is that the docket of the district court is so congested that a case begun there could not be finally determined before the expiration of the defendant's term, in January, 1907. It is obvious that no final determination could be had of the

present proceeding before that time unless it should be heard out of its regular order. Time could doubtless be saved, however, by instituting such a proceeding in the court of last resort, and that might ordinarily be a sufficient reason for such course.

But another feature of this case requires consideration. The sheriff is an officer sustaining a relation of peculiar intimacy to the district court. While he has duties to perform unrelated to that tribunal, he is in a general sense one of its officers. Allegations of misconduct with reference to carrying out the mandates of that court (and those here relied on are of that character) can be investigated with a greater assurance of reaching a just result in the county where the acts complained of are alleged to have been committed. The reasons stated in *The State, ex rel., v. Breese*, 15 Kan. 123, and *Supreme Lodge v. Carey*, 57 Kan. 655, 47 Pac. 621, for requiring applications to control the acts of the clerk of the district court to be made first to that court apply with substantially equal force in support of the contention that the same rule should be enforced in the case of a proceeding of this character against the sheriff. The rule of this court requiring the plaintiff bringing original proceedings here to show by affidavit why that course is adopted was not framed upon the theory that the existence of any particular class of reasons is jurisdictional, but with a view to afford an early opportunity in the history of each case for the court to determine whether there is good ground for the discretionary exercise of a conceded jurisdiction. The existence of the jurisdiction does not imply that a litigant has always an absolute and unconditional right to invoke it. (*In re Burnette, ante*, p. 609.) In the present instance the court is of the opinion that the controversy involved is one which can better be heard in the district court, and that the reasons given for a different course are not sufficient to overcome that consideration.

The cause is therefore dismissed.

APPENDIX.

MEMORANDUM DECISIONS.

SARAH G. SHATTUCK V. BELKNAP SAVINGS BANK *et al.*

No. 14,487. (83 Pac. 1116.)

Error from Harvey district court; PETER J. GALLE, judge. Opinion filed February 10, 1906. Affirmed.

S. W. Shattuck, jr., for plaintiff in error.

Whitcomb & Hamilton, for defendants in error.

Per Curiam: On the authority of *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, and *Henthorn v. Security Co.*, 70 Kan. 808, 79 Pac. 653, this case is affirmed. Under the uncontroverted facts, the only legal right, if any, the plaintiff has in the land in question is to redeem and have an accounting for rents.

ART VOLLE *et al.* V. PATRICK COOK *et ux.*

No. 14,325. (83 Pac. 1116.)

Error from Marshall district court; SAM KIMBLE, judge. Opinion filed March 10, 1906. Affirmed.

R. P. Evans, and *W. S. Glass*, for plaintiffs in error.

W. W. Redmond, for defendants in error.

Per Curiam: The action of the district court from which this proceeding in error arises related to a boundary which it was claimed had been fixed by parol and acquiesced in so as to bind the parties and their subsequent grantees. The only question is if the evidence supports the judgment of the trial court. A careful canvass of the record leads to the conclusion that the evidence is sufficient for that purpose, and the judgment is affirmed.

GEORGE M. EDWARDS V. WILLIAM SOURBEER *et ux.*

No. 14,414. (84 Pac. 1084.)

Error from Meade district court; EDWARD H. MADISON, judge. Opinion filed March 10, 1906. Reversed.

Francis C. Price, and *F. M. Davis*, for plaintiff in error.

Peters & Peters, and *R. W. Griggs*, for defendants in error.

Per Curiam: This is a companion case to *Edwards v. Sourbeer*, *ante*, p. 224, growing out of the same state of facts, and controlled by the conclusions there reached. The judgment is therefore reversed, and the same order directed as in that case.

THE CITY OF LIBERTY V. H. N. BUNDY AND
JOHN HILL.

No. 14,525. (83 Pac. 1116.)

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed March 10, 1906. Reversed.

Dooley & Keith, for appellants.

Per Curiam: This is an appeal from a conviction under a city ordinance the validity of which is assailed under the rule announced in *In re Van Tuyl*, 71 Kan. 659, 81 Pac. 181. The city has filed no brief, from which fact we assume that it is admitted that the ordinance is void under that decision. The judgment appealed from is therefore reversed.

THE STATE OF KANSAS V. FRED LORENTZ.

No. 14,732. (84 Pac. 1135.)

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed April 7, 1906. Dismissed.

C. C. Coleman, attorney-general, *Fred S. Jackson*, assistant attorney-general, and *Thomas Harley*, county attorney, for The State.

R. B. McWilliams, and *John W. Clark*, for appellant.

Per Curiam: The only paper filed in this court in this case is a document certified by the clerk of the court to be a copy of the information, warrant, and bill of exceptions. As no transcript of the record in the district court is presented this court has no jurisdiction, and the case is dismissed.

Memorandum Decisions.

THE STATE OF KANSAS V. WILLIAM CALLAHAN.

No. 14,733. (84 Pac. 1135.)

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed April 7, 1906. Dismissed.

C. C. Coleman, attorney-general, Fred S. Jackson, assistant attorney-general, and Thomas Harley, county attorney, for The State.

R. B. McWilliams, and John W. Clark, for appellant.

Per Curiam: The only paper filed in this court is a document certified by the clerk of the court to be a copy of the information, warrant, and bill of exceptions. As no transcript of the record in the district court is presented this court has no jurisdiction, and the case is dismissed.

THE STATE OF KANSAS, *ex rel.* C. C. Coleman, as Attorney-general, v. THE CITY OF KANSAS CITY.

No. 14,645. (84 Pac. 1135.)

Original proceeding in *quo warranto*. Opinion filed May 12, 1906. Judgment for plaintiff.

C. C. Coleman, attorney-general, for The State.

E. S. McAnany, and Ralph Nelson, for defendant.

Per Curiam: This is an original proceeding in *quo warranto* by the state of Kansas, on the relation of C. C. Coleman, attorney-general, to oust the city of Kansas City and its officers from granting license to, or authorizing, persons to engage in selling intoxicating liquors in that city to be used as a beverage. The substantial allegations of the petition are that the officers of Kansas City are exercising and for more than two years have exercised the corporate power of making, entering into and carrying out agreements and contracts with such persons as the officers of the city may choose, by which such persons have been, and are, granted the privilege of selling and keeping for sale within the city, and keeping and maintaining within the city, tippling-houses, and places for selling, and keeping for sale, habitually and as a business, intoxicating beverages to be at said places drunk as beverages. In consideration of such privileges such persons at stated intervals paid to the city a stipulated fine, which payments are required by the city and paid as a license for the privilege of conducting such business.

The city filed its answer, which upon the hearing was withdrawn, and consented that judgment might be awarded.

It is therefore ordered that judgment be entered as prayed for in the petition.

INDEX.

A.

ABANDONMENT—See "RAILROADS," 11.

ABSTRACT OF A JUDGMENT—See "JUDGMENTS."

ACCEPTANCE (OFFER AND)—See "CONTRACTS."

ACCOUNTS AND ACCOUNTING:

1. **Agency.**—See "AGENCY," 18.
2. **Evidence.**—See "EVIDENCE."
3. **Partnership.**—Findings of a court were said to amount to a finding that there had been an accounting and settlement of a partnership estate. *Harris v. Gibson* 765
4. **Rents and Profits.**—A surety who converted securities into a judgment and purchased at the execution sale, rented the property, and sold it to an innocent purchaser, all without the knowledge of the principal or cosureties, held accountable to them for rents and profits. *Page v. Harper*..... 229

AGENCY:

1. **Action for Wages.**—In an action for wages and expenses under a contract of hiring, an answer which disputes the length of time plaintiff was in defendant's service and pleads payment is insufficient to authorize a forfeiture of all compensation for dishonesty and other flagrant misconduct. *Spaulding v. Pepper* 644
2. **Attorneys.**—See "ATTORNEYS."
3. **Authority.**—Whether an alleged agent had authority to sign a note was held to be a question for the jury. *Duncan v. Huse*..... 432
4. ——— Where a note was payable at a bank, and was not due, and was paid to one not connected with the bank, who did not have possession of the note, and the agency was controverted, statements of the alleged agent when the papers were executed, unknown to the mortgagee, that the interest might be paid to him, were inadmissible. *Goodyear v. Williams*..... 192
5. ——— So of letters written by the plaintiff to the alleged agent relating to specific claims against other persons and of which defendant had no knowledge at the time of payment. *Id.*..... 192
6. ——— So of entries in a loan register, not a book of accounts, kept by the alleged agent, unknown to plaintiff or defendant at the time of payment. *Id.*... 192
7. ——— Where a debtor pays a note not due to a third person who does not have possession of it there

AGENCY—CONTINUED:

- is a *prima facie* presumption that the person receiving the money does so as the agent for the debtor. *Id.* 192
8. **Commission** (See, also, "MONOPOLIES," 2-4).—Where goods consigned by the owner to an agent were delayed in transit and converted by the carrier the consignee had such a special interest that he could maintain an action for the value of the property. *Railway Co. v. Implement Co.*..... 295
9. ——— The consignee holds the amount recovered in trust for the owner after deducting his commission. *Id.* 295
10. ——— One who employs a broker to find a buyer for land occupied by himself and wife as a homestead, and the broker produces a satisfactory purchaser, is liable for the agent's commission though the sale be prevented by the wife's refusal to convey. *Staley v. Hufford* 686
11. ——— Where A. employed B. to find a buyer, and B. did so, a letter stating that B. expected no pay unless they made a trade did not prevent B. from recovering a commission. *Id.*..... 686
12. ——— One who employs an agent to procure a purchaser for land is liable for a commission when a buyer is produced, agrees to the owner's terms, and is willing and able to buy, whether a sale is made or not. *Long v. Thompson*..... 76
13. ——— A petition for an agent's commission held good against demurrer. *Id.*..... 76
14. ——— The difference between an employment to sell and one to find a purchaser is well recognized. *Id.* 78
15. ——— A contract for the employment of a real-estate agent need not be in writing. *Id.*..... 79
16. **Death of Principal.**—See No. 24.
17. **Managing Agent.**—A managing agent within the meaning of the term of the statute providing for the service of summons upon a managing agent of a foreign corporation defined. *Betterment Co. v. Reeves*.. 107
18. ——— Where money was collected for another by a trust company, and mingled with its funds, in violation of directions to remit, and was thereby lost, the managing agents of the trust company, who knowingly permitted the misappropriation, were held personally liable, although there was no intent to defraud. *Sweet v. Savings Bank*..... 47
19. **Payment to Agent.**—See Nos. 4-7.
20. **Presumption.**—See No. 7.
21. **Recovery of Money from Agent** (See, also, No. 18).—Where money was paid to plaintiff's agent on a contract for the sale of land, a petition to recover the money on the ground of forfeiture held sufficient against demurrer. *Bowersox v. Hall*..... 99
22. **Special Interest.**—See Nos. 8, 9.
23. **Statute of Frauds.**—See No. 15.

AGENCY—CONTINUED:

24. **Termination.**—A contract held to have created a personal relation which was dissolved by the death of one of the parties, and did not bind the administrator of the estate. *Campbell v. Faxon*..... 675

25. **Trustees.**—See "TRUSTS AND TRUSTEES."

ACCRETION—See "WATERS AND WATER COMPANIES."

ACCUSATION—See "ATTORNEYS," 14, 15, 23.

ACKNOWLEDGMENT OF A DEBT—See "LIMITATION OF ACTIONS."

ACQUITTAL—See "CRIMINAL LAW."

ACTION AGAINST THE STATE—See "JURISDICTION."

ACTION IN NAME OF ANOTHER—See "FORCIBLE ENTRY AND DETAINER."

ACTIONS (JOINDER OF)—See "PRACTICE, DISTRICT COURT."

ACTIONS (LIMITATION OF)—See "LIMITATION OF ACTIONS."

ACTION TO QUIET TITLE—See "TITLE AND OWNERSHIP," 32, 33.

ADMINISTRATORS—See "EXECUTORS AND ADMINISTRATORS."

ADMISSION OF A MINOR—See "SCHOOLS AND SCHOOL-LAND."

ADMISSIONS—See "EVIDENCE;" "ANSWER."

ADULTERY—See "CRIMINAL LAW."

ADVERSE POSSESSION—See "TITLE AND OWNERSHIP."

AFTER-ACQUIRED TITLE—See "MORTGAGES."

AGGRAVATION—See "DAMAGES."

AGREEMENTS—See "CONTRACTS."

AGREEMENTS (ORAL)—See "FRAUD."

"ALIENATION"—See "MORTGAGES," 6-8, 28, 29.

AMENDMENT OF ANSWER—See "PRACTICE, DISTRICT COURT."

AMENDMENT OF A RECORD—See "JURISDICTION."

AMENDMENT OF A STATUTE—See "CONSTITUTIONAL LAW."

AMENDMENT OF PETITION—See "PRACTICE, DISTRICT COURT."

AMENDMENT OF PETITION IN ERROR—See "PRACTICE, SUPREME COURT."

AMENDMENT OF TRANSCRIPT—See "PRACTICE, SUPREME COURT."

AMOUNT IN CONTROVERSY—See "PRACTICE, SUPREME COURT."

ANSWER:

1. **Action for Material Furnished.**—Where a paving contract was void for restricting competition, and an action was brought to recover from the surety on the contractor's bond for material, an answer setting up the facts constituting the illegality and stating that the material was furnished with knowledge of such facts states a good defense. *Surety Co. v. Brick Co.*, 197
2. **Admission by Counsel.**—It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Hall v. Davidson*..... 88
3. **Admissions.**—See Nos. 13, 23, 24.
4. **Amendment.**—See "PRACTICE, DISTRICT COURT."
5. **Demurrer.**—See "DEMURRER."
6. **Denial under Oath.**—See Nos. 23, 24.
7. **Ejectment.**—Paramount right in a third person is not a defense in ejectment. *Fowler v. Wood*..... 551
8. **Election Contest.**—An objection by a contestee to the counting of ballots because they have not been legally preserved is an objection to evidence only and need not be pleaded in the contestee's answer. *Moorhead v. Arnold* 132
9. **Forfeiture of Contract.**—In an action for wages and expenses under a contract of hiring, an answer which disputes the length of time plaintiff was in defendant's service and pleads payment is insufficient to authorize a forfeiture of all compensation for dishonesty and other flagrant misconduct. *Spaulding v. Pepper* 644
10. **Fraud.**—In an action on a surety bond for material furnished to a contractor to pave certain streets, a demurrer to the answer was held to have been improperly sustained. *Atkin v. Coal Co.*..... 768
11. **General Denial.**—Any evidence is admissible under a general denial which controverts the facts denied. *Railway Co. v. Brickell*..... 274
12. ——— An objection that the defense of the statute of frauds was not properly pleaded, raised for the first time in this court, cannot be regarded with favor. *Baldwin v. Baldwin*..... 41
13. ——— The defense that a foreign corporation has not been granted authority to carry on business within the state is not raised by a general denial, but must be specially pleaded. *Leonard v. Steel Co.*..... 79
14. ——— Where a petition in ejectment alleges full title, and the answer includes a general denial, coupled with a claim of a fractional interest, the plaintiff, upon proof of partial title, is entitled to a proportionate recovery and to judgment for costs. *Young v. Bigger* 146
15. ——— Such a case is not within the provisions requiring a tenant in common in suing a cotenant for possession to allege that defendant has denied his right. *Id.*..... 146

ANSWER—CONTINUED:

16. Inconsistency.—See "DEMURRER," 1.
17. Plaintiff's Incapacity.—See No. 13.
18. Special Questions.—See "JURY AND JURORS."
19. Specific Plea.—See Nos. 8, 9, 12, 13, 21.
20. Statute of Frauds.—See No. 12.
21. Statute of Limitations.—The statute of limitations, to be available as a defense, must be affirmatively pleaded or otherwise asserted, and a failure to do so constitutes a waiver of such defense. *Croan v. Baden*, 364
22. ——— The laws of Kansas relating to the limitation of actions apply exclusively in this state, except when the requirements of the statute permitting the law of another state to be applied have been complied with. *Id.* 364
23. Verification.—An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath. *O'Keefe v. Behrens* 469
24. ——— Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based. *Id.* 469

ANTITRUST LAW—See "MONOPOLIES."

APPEAL AND ERROR—See "PRACTICE, SUPREME COURT."

APPEAL BOND—See "BONDS."

APPEAL BY STATE (DELAY)—See "CRIMINAL LAW."

APPEAL FROM POLICE COURT—See "PRACTICE, DISTRICT COURT."

APPEARANCE BOND—See "BONDS."

APPELLATE JURISDICTION—See "JURISDICTION."

APPLICATION FOR MEMBERSHIP—See "INSURANCE."

APPLICATION TO SELL REAL ESTATE—See "GUARDIAN AND WARD."

APPOINTMENT—See "GUARDIAN AND WARD."

APPRAISERS—See "OFFICE AND OFFICERS."

APPROPRIATION OF LANDS—See "INJUNCTION."

ARGUMENT TO JURY—See "PRACTICE, DISTRICT COURT."

ASSESSMENTS (MONTHLY)—See "INSURANCE."

ASSESSORS—See "OFFICE AND OFFICERS."

ASSETS OF ESTATE—See "EXECUTORS AND ADMINISTRATORS."

ASSETS (OWNERSHIP)—See "JUDGMENTS," 33.

ASSIGNMENT OF CERTIFICATE—See "TAXATION."

ASSIGNMENTS OF ERROR—See "PRACTICE, SUPREME COURT."

ASSIGNMENT TO A SURETY—See "JUDGMENTS."

ASSUMPTION OF MORTGAGE—See "CONVEYANCES."

ASSUMPTION OF RISK—See "DAMAGES."

ATTESTATION—See "WILLS."

ATTORNEYS:

1. **Argument to Jury.**—Certain remarks of counsel in argument before the jury considered and held to have been proper. *Railway Co. v. Wade*..... 359
2. ——— A new trial was asked for alleged misconduct of the prosecutor in argument. By affidavits an issue of fact as to what he said was raised. Denial of a new trial amounted to a finding against the facts alleged in the motion. *The State v. Campbell*.. 690
3. **Briefs.**—A compliance with rule 10 of this court is necessary to the proper consideration of many questions presented for decision, and cases may be affirmed where this rule is not followed. *Hatch v. Geiser* 81
4. ——— Such findings are not printed in the brief or further described, the evidence supposed to support them is not pointed out, and the assignment of error is not argued. Hence the matter will not be considered. *Ehrsam v. Jackman*..... 447
5. **Burden of Proof.**—See Nos. 22, 25.
6. **Cause Remanded for Trial.**—See Nos. 14, 15.
7. **Court Trier of Facts.**—See No. 28.
8. **Depositions.**—See No. 18.
9. **Disbarment.**—Evidence held insufficient to warrant the disbarment of an attorney. *In re Elliott*..... 151
10. ——— There is no statute of limitation which is technically applicable to a disbarment proceeding. *Id.* 151
11. ——— Alleged misconduct of an attorney held to be too stale to be considered. *Id.*..... 151
12. ——— Requisites of a privileged communication from a client to his attorney prescribed. *Id.*..... 151
13. ——— An answer prepared by an attorney, having been published by the client, was not a confidential communication. *Id.*..... 151
14. ——— After judgment remanding a disbarment appeal for trial, it is not essential that the accusation be refiled in the district court. *In re Burnette*..... 610
15. ——— Omission to make a specific order relating to the transfer and custody of the accusation does not deprive the district court of jurisdiction, and if the accusation be accessible to the court and the accused during the trial he sustains no injury of which he can complain. *Id.*..... 610
16. ——— The statute relating to appeals in disbarment cases providing for a transfer to this court of the original papers and a transcript of the docket, to be finally considered, does not authorize a trial *de novo* but creates a special method for bringing such causes to this court for consideration under its appellate jurisdiction. *Id.*..... 610

ATTORNEYS—CONTINUED:

17. — Disbarment is not a criminal proceeding, but its gravity suggests caution and strictness. The special statute regulating it must be followed. Otherwise it is to be conducted in harmony with the practice in civil cases. *Id.*..... 609
18. — Depositions against the accused in a disbarment proceeding are admissible. *Id.*..... 614
19. — The failure of the accused in a disbarment proceeding to give testimony either in denial or explanation of incriminating facts may be considered by the court in weighing the evidence of his guilt. *Id.*... 611
20. — A publication by a client of a privileged communication released the attorney from the confidential relation he bore to it. *Id.*..... 610
21. — Evidence in a disbarment proceeding examined and held to support a finding of guilty. *Id.*.... 626
22. — Testimony of moral and professional delinquency held to meet the requirement that more than a preponderance of the evidence is necessary, and to be sufficient to support the judgment of disbarment. *In re Smith.*..... 744
23. — The technical requirements of criminal pleading are not required in an accusation in disbarment. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated or whether some of them are repeated in several paragraphs is not vital. *Id.*..... 744
24. — In a proceeding for the disbarment of an attorney the statute of limitations is no defense. *Id.*, 744
25. — Where the charges made against an attorney involve moral turpitude, proof of a conviction is not essential to a disbarment. *Id.*..... 744
26. — The statute does not limit the common-law power of the court to disbar attorneys. *Id.*..... 743
27. — An attorney may be disbarred not only for malpractice and dishonesty in his profession, but also for gross misconduct showing him to be unworthy of the privileges which the law confers on him. *Id.*.... 743
28. — In such a case the court itself is the trier of both facts and law, and these functions cannot be delegated to a committee, commissioner, or referee. *Id.*..... 744
29. Estoppel.—See Nos. 32, 39.
30. Failure to Testify.—See No. 19.
31. Form of Accusation.—See No. 23.
32. Journal Entry.—The indorsement by an attorney of a journal entry does not estop the denial of its correctness. *Christisen v. Bartlett.*..... 403
33. Lien for Fees.—An attorney may acquire a lien for his compensation upon money due his client from the adverse party, but such lien does not extend to land which is the subject-matter of the litigation. *Holmes v. Waymire* 104

ATTORNEYS—CONTINUED:

34. ——— A judgment determining the amount of money due is not essential to the existence of a charging lien, and a collusive settlement and dismissal of a suit will not defraud an attorney of his fee. *Id.*..... 106
35. Limitation of Actions.—See Nos. 10, 11, 24.
36. Misconduct of Prosecutor.—See No. 2.
37. Offer of Proof.—See "PRACTICE, DISTRICT COURT."
38. Privileged Communication.—See Nos. 12, 13, 20.
39. Real Party in Interest.—One who as attorney brought unlawful detainer in another's name held estopped to deny that the nominal plaintiff was the real party in interest and entitled to settle the litigation, although defendant had notice that the attorney claimed to be himself entitled to possession. *Edwards v. Sourbeer*..... 224
40. Refiling of Accusation.—See Nos. 14, 15.
41. Settlement by Nominal Plaintiff.—See No. 39.
42. Signing of Petition.—An objection that a petition is not signed by the plaintiff has no force where it is signed by his attorneys. *New v. Smith*..... 178
43. Statement to Jury.—It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Hall v. Davidson*..... 88
44. Trial *De Novo*.—See No. 16.

AUTHENTICATION OF A DEED—See "TAXATION."

AUTHORITY OF AGENT—See "AGENCY."

AUTHORITY OF SECRETARY—See "CORPORATIONS."

AVULSION—See "WATERS AND WATER COMPANIES."

B.

BALLOTS—See "ELECTIONS."

BANKS AND BANKING—See "FRAUD," 15; "NEGOTIABLE INSTRUMENTS."

BENEFICIARY CERTIFICATE—See "INSURANCE."

BILL OF PARTICULARS—See "PRACTICE, JUSTICE OF THE PEACE."

BILLS AND NOTES—See "NEGOTIABLE INSTRUMENTS."

BOARD (CHARTER)—See "OFFICE AND OFFICERS."

BOARD OF COUNTY COMMISSIONERS—See "OFFICE AND OFFICERS."

BOARD OF EDUCATION—See "SCHOOLS AND SCHOOL-LAND."

BOARD OF RAILROAD COMMISSIONERS—See "RAILROADS."

BOARD (TOWNSHIP)—See "OFFICE AND OFFICERS."

BONA FIDE HOLDER—See "NEGOTIABLE INSTRUMENTS."

BONDS:

1. **Appeal Bond.**—Upon an appeal from the police court, the bond was signed by the defendant alone, and approved by the police judge. It was error for the district judge to dismiss the appeal because the bond lacked the signature of a surety. *Ottawa v. Johnson*, 165
2. **Appearance Bond.**—Where defendant declined to plead or answer to an amended information his appearance bond was properly adjudged forfeited. *Jones v. The State*..... 771
3. **Contractor's.**—The legislature may require persons contracting to improve city streets to give bonds executed by some security company authorized to do business within the state. *Parker-Washington Co. v. Kansas City* 722
4. ——— Where a contract for paving is void for restricting competition in the purchase of materials, all the proceedings are void, and one furnishing material with knowledge of the facts constituting the illegality cannot recover against the surety on the contractor's bond. *Surety Co. v. Brick Co.*..... 197
5. **Evidence of Peaceable Entry.**—In an action of forcible entry and detainer, where defendant claimed he entered peaceably, with plaintiffs' verbal permission, a bond for a deed executed by plaintiffs was admissible to show the character of defendant's entry and possession. *West v. Comeaux*..... 271
6. **Forfeiture.**—See No. 2.
7. **Surety of Contractor.**—In an action on a surety bond for material furnished to a contractor to pave certain streets, a demurrer to the answer was held to have been improperly sustained. *Atkin v. Coal Co.*... 768

BOUNDARIES—See "SURVEYS AND BOUNDARIES;" "WATERS AND WATER COMPANIES."

BREACH OF CONTRACT—See "DAMAGES."

BRIBERY—See "CRIMINAL LAW."

BRIEFS—See "PRACTICE, SUPREME COURT."

BURDEN OF PROOF—See "EVIDENCE."

BURGLARY—See "CRIMINAL LAW."

BURIAL ASSOCIATION—See "INSURANCE."

C.

CABS—See "DAMAGES," 103-105.

CALLING OF WITNESSES—See "CRIMINAL LAW."

CARRIERS—See "RAILROADS;" "DAMAGES," 103-105.

CASE-MADE—See "PRACTICE, SUPREME COURT."

CASES CITED IN DISSENTING OPINIONS:

<i>Carithers v. Weaver</i> , 7 Kan. 110.....	481
<i>C. K. & N. Rly. Co. v. Cook</i> , 43 Kan. 83.....	481
<i>Coulson v. Wing</i> , 42 Kan. 507.....	481
<i>Delashmutt v. Parrent</i> , 39 Kan. 548.....	481

CASES CITED IN DISSENTING OPINIONS—CONTINUED:

Duffitt v. Tuhan, 28 Kan. 292.....	481
Hall's Heirs v. Dodge, 18 Kan. 211.....	481
Howbert v. Heyle, 47 Kan. 58.....	482
Mickel v. Hicks, 19 Kan. 578.....	481
Rogers v. Clemmans, 26 Kan. 522.....	481
Taylor v. Miles, 5 Kan. 498.....	481
Young v. Walker, 26 Kan. 242.....	481

CASES CRITICIZED, SUPREME COURT:

Howbert v. Heyle, 47 Kan. 58.....	472
-----------------------------------	-----

CASES DISAPPROVED, COURTS OF APPEAL:

State v. Hook, 4 Kan. App. 451.....	331
-------------------------------------	-----

CASES DISAPPROVED, SUPREME COURT:

Brewster v. Madden, 15 Kan. 249....	453, 455-457, 459-462
Gruble v. Ryus, 23 Kan. 195.....	283, 286
Lott v. K. C. Ft. S. & G. Rld. Co., 42 Kan. 293.....	286
Mellison v. Allen, 30 Kan. 382.....	453, 455, 457, 462
Norris v. Evans, 39 Kan. 668.....	286
Rathbone v. Boyd, 30 Kan. 485.....	343, 355

CASES DISTINGUISHED:

Asbell v. The State, 60 Kan. 51.....	163
Barton v. Mulvane, 59 Kan. 313.....	349
Claffin v. Case, 53 Kan. 562.....	217
Comm'rs of Leavenworth Co. v. Keller, 6 Kan. 510....	72
Doyle v. Doyle, 33 Kan. 721.....	601
Fisher v. Stockebrand, <i>Adm'r</i> , 26 Kan. 565.....	774
Ice Co. v. Wylie, 65 Kan. 104.....	349
Kalina v. Railroad Co., 69 Kan. 172.....	366
K. P. Rly. Co. v. Thacher, 17 Kan. 92.....	106
McAnarney v. Caughenaur, 34 Kan. 621.....	412
Myers v. Coonradt, 28 Kan. 211.....	601
Noftzger v. Moffitt, 63 Kan. 354.....	106
Roach v. St. J. & I. Rld. Co., 55 Kan. 654.....	267
State v. Bogardus, 63 Kan. 259.....	573
State v. Jack, 69 Kan. 387.....	349, 350
State v. Taylor, 36 Kan. 329.....	699
Stewart v. Fowler, 37 Kan. 677.....	78
Stump v. Burnett, 67 Kan. 589.....	601
Thimes v. Stumpff, 33 Kan. 53.....	687
Walker v. Boh, 32 Kan. 354.....	601, 603
Wiswell v. Tefft <i>et al.</i> , 5 Kan. 263.....	41

CASES FOLLOWED, COURTS OF APPEAL:

Bolinger v. Brake, 4 Kan. App. 180.....	12
---	----

CASES FOLLOWED, SUPREME COURT:

Anderson v. Pierce, 62 Kan. 756.....	662
Arends v. City of Kansas City, 57 Kan. 350.....	573
Asbell v. The State, 60 Kan. 51.....	164
Atkins v. Nordyke, 60 Kan. 354.....	284
A. T. & S. F. Rld. Co. v. Brown, <i>Adm'r</i> , 26 Kan. 443, 254, 255	
A. T. & S. F. Rld. Co. v. Frazier, 27 Kan. 463.....	118
A. T. & S. F. Rld. Co. v. Johns, 36 Kan. 769.....	361
A. T. & S. F. Rld. Co. v. Ledbetter, 34 Kan. 326.....	490
A. T. & S. F. Rld. Co. v. Temple, 47 Kan. 7.....	468
A. T. & S. F. Rld. Co. v. Wagner, 33 Kan. 660.....	490
A. T. & S. F. Rld. Co. v. Weber, <i>Adm'r</i> , 33 Kan. 543....	252

CASES FOLLOWED, SUPREME COURT—CONTINUED:

A. T. & S. F. Rld. Co. v. Woodcock, <i>Treas.</i> , 18 Kan. 20..	509
Auditor of State v. A. T. & S. F. Rld. Co., 6 Kan. 500..	618
Ayres v. Hull, 5 Kan. 419.....	678
Baker v. Stewart, 40 Kan. 442.....	21
Baldwin v. Squier, 31 Kan. 283.....	45, 46
Bank v. Kingman, 62 Kan. 571.....	532
Bank v. McIntosh, 72 Kan. 603.....	774
Bank v. Woodrum, 60 Kan. 34.....	232
Belz v. Bird, 31 Kan. 139.....	600
Betz v. Land Co., 46 Kan. 45.....	78
Billard v. Board of Education, 69 Kan. 53.....	34
Binns v. Adams, 54 Kan. 615.....	759
Black v. Elliott, 63 Kan. 211.....	479
Blood v. Northup and Chick, 1 Kan. 28.....	293
Board of Education v. Tinnon, 26 Kan. 1.....	34
Bolinger v. Brake, 57 Kan. 663, 58 Kan. 818.....	12
Bolz v. Crone, 64 Kan. 570.....	410, 411
Bonebrake v. Tauer, 67 Kan. 827.....	670
Bowersock v. Adams, 55 Kan. 681.....	370
Brick Co. v. Zimmerman, 61 Kan. 750.....	363
Brook v. Teague, 52 Kan. 119.....	293
Brown, <i>Adm'r</i> , v. A. T. & S. F. Rld Co., 31 Kan. 1.....	564
Bryan v. Bauder, 23 Kan. 95.....	64
Buchanan v. Gibbs, 26 Kan. 277.....	294
Burditt v. Burditt, 62 Kan. 576.....	262
Butler v. Scott, 68 Kan. 512.....	239
Calloway v. Cooley, 50 Kan. 743.....	395
Campbell v. Fuller, 25 Kan. 723.....	762
Carruthers v. C. R. I. & P. Rly. Co., 55 Kan. 600.....	490
Carson v. Funk, 27 Kan. 524.....	759
Cartwright v. Korman, 45 Kan. 515.....	780
Case v. Lanyon, 62 Kan. 69.....	247
C. B. & Q. Rld. Co. v. Atchison County, 54 Kan. 781....	504
C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co., 26 Kan. 669,	86
C. B. U. P. Rld. Co. v. Shoup, 28 Kan. 394.....	788
Cheesebrough v. Parker, 25 Kan. 566.....	479
Chick and others v. Willetts, 2 Kan. 384.....	461
City of Argentine v. Simmons, 54 Kan. 699.....	573
City of Emporia v. Volmer, 12 Kan. 622.....	747
City of Leavenworth <i>et al.</i> v. Norton <i>et al.</i> , 1 Kan. 432,	71
City of McPherson v. Manning, 43 Kan. 129.....	759
City of Sedan v. Church, 29 Kan. 190.....	378
City of Topeka v. Martineau, 42 Kan. 387.....	142
C. K. & W. Rld. Co. v. Cosper, 42 Kan. 561.....	594
C. K. & W. Rld. Co. v. Parsons, 51 Kan. 408.....	55
Clark v. Schnur, 40 Kan. 72.....	759
Clarke v. Tilden, 72 Kan. 574.....	312
Close v. Wheaton, 65 Kan. 830.....	598
Coal Co. v. Emlen, 44 Kan. 117.....	75
Coal Co. v. Limb, 47 Kan. 469.....	254
Cogshall v. Spurry, 47 Kan. 448.....	756, 759
Cohen v. St. L. Ft. S. & W. Rld. Co., 34 Kan. 158.....	55
Coleman v. Coleman, 69 Kan. 39.....	394
Conaway v. Gore, 27 Kan. 122.....	273, 386
Conklin v. Hutchinson, 65 Kan. 582.....	510
Connell v. Moore, 70 Kan. 88.....	637, 639
Corlett v. Insurance Co., 60 Kan. 134.....	262
Crawford v. K. C. Ft. S. & G. Rld. Co., 45 Kan. 474....	756
Crockett v. Gray, 31 Kan. 346.....	784

CASES FOLLOWED, SUPREME COURT—CONTINUED:

Crowther v. Elliott, 7 Kan. 235.....	103
Davis v. McCrocklin, 34 Kan. 218.....	276
Deering v. Boyle, 8 Kan. 525.....	9, 10, 12-16
Dewald v. K. C. Ft. S. & G. Rld. Co., 44 Kan. 586..	233, 236
Dodge v. Oatis, 27 Kan. 762.....	293
Donald v. Stybr, 65 Kan. 578.....	264
Doran v. Barnes, 54 Kan. 238.....	573
Douglas v. Anderson, 28 Kan. 262.....	387
Drake v. National Bank, 33 Kan. 634.....	451
Dryden v. C. K. & N. Rly. Co., 47 Kan. 445.....	759
Edwards v. Fry, 9 Kan. 417.....	42, 45
Edwards v. Sourbeer, 73 Kan. 224.....	794
Elliott v. Burnette, 72 Kan. 624.....	630
English v. Williamson, 34 Kan. 212.....	559
Evans v. Thomas, 32 Kan. 469.....	617
Farlin v. Sook, 80 Kan. 401.....	748
Felker v. Elk County, 70 Kan. 96.....	71
Fitzpatrick v. Gebhart, 7 Kan. 35.....	322
Flanigan v. Waters, 57 Kan. 18.....	44
Fleming v. Bale, 23 Kan. 88.....	473
Fleming v. Greene, 48 Kan. 646.....	355
Flint v. Dulany, 37 Kan. 332.....	600
Foreman v. Carter, 9 Kan. 674.....	479
Furniture Co. v. Spencer, 59 Kan. 168.....	606
Galbraith v. Galbraith, 5 Kan. 402.....	43
Gatton v. Tolley, 22 Kan. 678.....	147
George v. Hunter, 48 Kan. 651.....	122
Gerlach v. Skinner, 34 Kan. 86.....	355
Gilmore v. Asbury, 64 Kan. 383.....	386
Goddard v. Donaha, 42 Kan. 754.....	42
Goggin v. K. P. Rly. Co., 12 Kan. 416.....	468
Harris v. Frank, 29 Kan. 200.....	372
Harter v. A. T. & S. F. Rld. Co., 55 Kan. 250.....	489
Hartley v. Costa, 40 Kan. 552.....	559
Harwi v. Klippert, 67 Kan. 743.....	783
Headley v. Challiss, 15 Kan. 602.....	783
Hefley v. Baker, 19 Kan. 9.....	322
Helling v. Darby, 71 Kan. 107.....	79
Henthorn v. Security Co., 70 Kan. 808.....	793
Hogaboom v. Flower, 67 Kan. 41.....	264
Hoopes v. Railway Co., 72 Kan. 422.....	223
Hubbard v. Jones, 61 Kan. 722.....	372
Hunt v. Bowman, 62 Kan. 448.....	461
Hunter v. Kramer, 71 Kan. 468.....	426
<i>In re</i> Burnette, 70 Kan. 229.....	612
<i>In re</i> Burnette, 73 Kan. 609.....	753, 792
<i>In re</i> Elliott, 73 Kan. 151.....	632, 750
<i>In re</i> Hughbanks, <i>Petitioner</i> , 44 Kan. 105.....	413
<i>In re</i> McMicken, <i>Petitioner</i> , 39 Kan. 406.....	740
<i>In re</i> Norris, 60 Kan. 649.....	614, 615, 748
<i>In re</i> Van Tuyl, 71 Kan. 659.....	794
Insurance Co. v. Harn, 69 Kan. 249.....	239
Investment Co. v. Walsh, 70 Kan. 899.....	403
Jansen v. City of Atchison, 16 Kan. 358.....	565
Jaquith v. Davidson, 21 Kan. 341.....	670
Johnson v. Jones, 58 Kan. 745.....	95
Johnson v. Leggett, 28 Kan. 590.....	451
Jordan v. Telegraph Co., 69 Kan. 140.....	81
Kalina v. Railroad Co., 69 Kan. 172.....	468

CASES FOLLOWED, SUPREME COURT—CONTINUED:

Kansas City v. Kimball, 60 Kan. 224.....	573
Kaub v. Mitchell, 12 Kan. 57.....	322
K. C. & E. Rld. Co. v. Kregelo, 32 Kan. 608.....	594
K. & C. P. Rly. Co. v. Wright, 53 Kan. 272.....	239
K. C. & S. W. Rld. Co. v. Baird, 41 Kan. 69.....	142
K. C. W. & N. W. Rld. Co. v. Fisher, 49 Kan. 17.....	55
Kellogg v. Lewis, 28 Kan. 535.....	386
Kelso v. Norton, 65 Kan. 778.....	684, 793
Kemper v. Modern Woodmen, 70 Kan. 119.....	127
Kinnard v. Stanley, 70 Kan. 770.....	443
Kirkwood v. Koester, 11 Kan. 471.....	461
Knott v. Tade, 58 Kan. 94.....	606
Knox v. Board of Education, 45 Kan. 152.....	34
K. P. Rly. Co. v. Couse, 17 Kan. 571.....	564
K. P. Rly. Co. v. Cutter, 19 Kan. 83.....	253
Land Co. v. Muret, 57 Kan. 192.....	285
Larimer v. Kelley, 10 Kan. 298.....	10, 11
LaRue v. Insurance Co., 68 Kan. 539.....	501
Libbey v. Railway Co., 69 Kan. 869.....	223
L. N. & S. Rly. Co. v. Whitaker, 42 Kan. 634.....	31
Long v. Culp, 14 Kan. 412.....	340
Loring v. Rockwood, 13 Kan. 178.....	322
Lovitt v. Wellington & Western Rld. Co., 26 Kan. 297..	167
Martindale v. Battey, 73 Kan. 92.....	403
Mastin v. Gray, 19 Kan. 458.....	473
McBride v. Steinweden, 72 Kan. 508.....	522, 551
McCartney v. Spencer, <i>Ex'r</i> , 26 Kan. 62.....	670
McClain v. Jones, 60 Kan. 639.....	386
McClelland Bros. v. Allison, 34 Kan. 155.....	166
McClelland v. Cragun, 54 Kan. 599.....	281
McKean v. Massey, 9 Kan. 600.....	670
Mickel v. Hicks, 19 Kan. 578.....	63, 470
Miller v. Brumbaugh, 7 Kan. 343.....	293
Miller v. Morrison, 43 Kan. 446.....	20
Miner v. Pearson, 16 Kan. 27.....	12
M. K. & T. Rly. Co. v. Weaver, 16 Kan. 456.....	362
Modern Woodmen v. Heath, 71 Kan. 148.....	255, 257, 258
Mowery v. Bank, 67 Kan. 128.....	239
National Bank v. Barber, <i>Treas., &c.</i> , 24 Kan. 534.....	509
National Bank v. Jaffray, 41 Kan. 691.....	759
Neiderlander v. Starr, 50 Kan. 770.....	73
New v. Smith, 68 Kan. 807.....	95
Noble v. Doughten, 72 Kan. 336.....	789
Norris v. Corkhill, 32 Kan. 409.....	23
Northrup v. Wills, 65 Kan. 769.....	80
Ordway v. Cowles, 45 Kan. 447.....	262
Palm v. Poponoe, 60 Kan. 297.....	781
Park v. Tinkham, 9 Kan. 615.....	103
Penrose v. Cooper, 71 Kan. 725.....	401
Peuker v. Canter, 62 Kan. 363.....	538, 548
Peyton's Appeal, 12 Kan. 398.....	153, 613, 748
Pierce v. Bicknell, 11 Kan. 262.....	176
Pracht v. McNee, 40 Kan. 1.....	327
Pratt v. Ard, 63 Kan. 182.....	212
Priest v. Robinson, 64 Kan. 416.....	473
Proctor v. Dicklow, 57 Kan. 119.....	395
Protective Union v. Gardner, 41 Kan. 397.....	747
Prouty v. Stover, <i>Lieut.-governor</i> , 11 Kan. 235.....	240
Rahm v. Soper, 28 Kan. 529.....	371

CASES FOLLOWED, SUPREME COURT—CONTINUED:

Railroad Co. v. Burrows, 62 Kan. 89.....	361
Railroad Co. v. Chance, 57 Kan. 40.....	361
Railroad Co. v. Jackson, 70 Kan. 791.....	170
Railroad Co. v. McMinn, 72 Kan. 681.....	223
Railroad Co. v. Swarts, 58 Kan. 235.....	490, 491
Railroad Co. v. Tindall, 57 Kan. 719.....	490, 492
Railway Co. v. Davenport, 65 Kan. 206.....	594
Railway Co. v. Frazier, 66 Kan. 422.....	362
Railway Co. v. Goodholm, 61 Kan. 758.....	301
Railway Co. v. Moffatt, 60 Kan. 113.....	252
Railway Co. v. Posten, 59 Kan. 449.....	251
Railway Co. v. Preston, 63 Kan. 819.....	420
Railway Co. v. Ryan, 62 Kan. 682.....	252
Railway Co. v. Scheinkoenig, 62 Kan. 57.....	251
Railway Co. v. Schwindt, 67 Kan. 8.....	223
Railway Co. v. Sharpless, 62 Kan. 841.....	461
Railway Co. v. Withers, 69 Kan. 620.....	223
Richmond v. Brummie, 52 Kan. 247.....	281
Risse v. Planing-mill Co., 55 Kan. 518.....	210
Ritchie v. K. N. & D. Rly. Co., 55 Kan. 36.....	286, 559
Ritchie v. Mulvane, 39 Kan. 241.....	421
Robbins v. Mackie, 70 Kan. 646.....	239
Sample v. Sample, 34 Kan. 73.....	480
Sandefur v. Hines, 69 Kan. 168.....	79
Sawyer v. Sauer, 10 Kan. 466.....	557
Schmucker v. Sibert, 18 Kan. 104.....	328
Seeds v. Bridge Co., 68 Kan. 522.....	662
Sewing-machine Co. v. Wait, 24 Kan. 186.....	371
Sheehan v. Allen, 67 Kan. 712.....	480
Simpson v. Kansas City, 52 Kan. 88.....	573
Smith v. Becker, 62 Kan. 541.....	175
Sprague v. Mo. Pac. Rly. Co., 34 Kan. 347.....	468
Stansfield v. Kunz, 62 Kan. 797.....	355
State v. Bancroft, 22 Kan. 170.....	499
State v. Bogue, 52 Kan. 79.....	163
State v. Bohan, 19 Kan. 28.....	747
State v. Bowles, 70 Kan. 821.....	501
State v. Cain, 69 Kan. 186.....	170
State v. Campbell, 73 Kan. 688.....	738
State v. Downs, 60 Kan. 788.....	726
State v. Edwards, 35 Kan. 105.....	738
State v. Finch, 71 Kan. 793.....	699
State v. Gregory, 46 Kan. 290.....	716
State v. Greenburg, 59 Kan. 404.....	665
State v. Grinstead, 62 Kan. 598.....	747
State v. Hendricks, 32 Kan. 559.....	16, 22
State v. Inman, 70 Kan. 894.....	699
State v. Mowry, 37 Kan. 369.....	320
State v. O'Neil, 51 Kan. 651.....	320
State v. Parmenter, 70 Kan. 513.....	747
State v. Patterson, 66 Kan. 447.....	331
State v. Pittman, 10 Kan. 593.....	501
State v. Smiley, 65 Kan. 240.....	357
State v. Stark, 63 Kan. 529.....	747
State v. Suppe, 60 Kan. 566.....	341
State v. Walker, 36 Kan. 297.....	20
State v. White, 14 Kan. 538.....	320
State v. White, 44 Kan. 514.....	332
State v. Williams, 61 Kan. 789.....	421

CASES FOLLOWED, SUPREME COURT—CONTINUED:

State v. Witt, 34 Kan. 488.....	730
State v. Woods, 49 Kan. 237.....	832
State v. Yeiter, 54 Kan. 277.....	499
State, <i>ex rel.</i> , v. Breese, 15 Kan. 123.....	617, 792
State, <i>ex rel.</i> , v. Comm'rs of Marion Co., 21 Kan. 19.....	509
State, <i>ex rel.</i> , v. Wilson, 80 Kan. 661.....	618
Stewart v. Balderston, 10 Kan. 131.....	102
Stewart v. Fowler, 53 Kan. 537.....	78
Stewart v. Smith, 72 Kan. 77.....	767
Stinson v. Cook, 53 Kan. 179.....	281
St. Jos. & D. C. Rld. Co. v. Dryden, 17 Kan. 278.....	565
St. L. & S. F. Rly. Co. v. Corser, 81 Kan. 705.....	289
St. L. & S. F. Rly. Co. v. Sharp, 27 Kan. 134.....	322, 323
Stouffer v. Harlan, 68 Kan. 135.....	684, 685
Struthers v. Fuller, 45 Kan. 735.....	759
Sullivan v. Phenix Ins. Co., 34 Kan. 170.....	564
Sullivant v. Jahren, 71 Kan. 127.....	79
Supreme Lodge v. Carey, 57 Kan. 655.....	617, 792
Surety Co. v. Brick Co., 73 Kan. 196.....	768, 769
Swarz v. Ramala, 63 Kan. 683.....	597
Sweet v. Bank, 69 Kan. 641.....	48-50
Tallman v. Jones, 13 Kan. 488.....	11
Taylor v. Hosick, <i>Adm'r, &c.</i> , 18 Kan. 518.....	414, 418
Topeka City Rly. Co. v. Higgs, 38 Kan. 375.....	557
Thornburg v. Cole, 27 Kan. 490.....	604
Treptow v. Buse, 10 Kan. 170.....	871
True v. Brandt, 72 Kan. 502.....	606
U. P. Rly. Co. v. Mitchell, 56 Kan. 324.....	862
Waite v. Teeters, 36 Kan. 604.....	887
Water-supply Co. v. Dodge City, 55 Kan. 60.....	285
Watkins v. Houck, 44 Kan. 502.....	463
Watkins v. Mullen, 62 Kan. 1.....	395
Watson v. Voorhees, 14 Kan. 328.....	463
Western Mass. Ins. Co. v. Duffey, 2 Kan. 347.....	102
Western News Co. v. Geo. O. Wilmarth, 34 Kan. 254.....	784
Wicks v. Mitchell, 9 Kan. 80.....	9, 12, 14, 15
Winkfield v. Brinkman, 21 Kan. 682.....	232
Winn v. Abeles, 35 Kan. 85.....	596
Wood v. Fowler, 26 Kan. 682.....	538
W. & W. Rly. Co. v. Koch, 47 Kan. 753.....	468
Young v. Ledrick, 14 Kan. 92.....	370
Young v. Walker, 26 Kan. 242.....	471, 472
Zinc Co. v. Dwight, 69 Kan. 852.....	239
Zirkle v. Railway Co., 67 Kan. 77.....	223

CASES OVERRULED, SUPREME COURT:

Brewster v. Madden, 15 Kan. 249.....	453
Mellison v. Allen, 30 Kan. 382 (partially).....	453

CERTIFICATE (ASSIGNMENT)—See "TAXATION."

CERTIFICATE (BENEFICIARY)—See "INSURANCE."

CHANGE IN INTEREST—See "INSURANCE."

CHANGE OF VENUE—See "PRACTICE, DISTRICT COURT."

CHARTER BOARD—See "OFFICE AND OFFICERS."

CHATTEL MORTGAGES—See "MORTGAGES," 18-21.

CHECKS—See "NEGOTIABLE INSTRUMENTS."

CHILD (PARENT AND)—See "CONTRACTS;" "DAMAGES," 73, 89; "SCHOOLS AND SCHOOL-LAND," 1.

CIRCUMSTANTIAL EVIDENCE—See "CRIMINAL LAW."

CITIES AND CITY OFFICERS:

1. **Appeal from Police Court.**—See "PRACTICE, DISTRICT COURT."
2. **Classification—Population.**—See Nos. 13-17.
3. **Contractor's Bond.**—See Nos. 12, 18.
4. **Contract Restricting Competition.**—See Nos. 10, 12.
5. **Description of Material.**—See No. 11.
6. **Judge *Pro Tem*.**—One claiming to act as a judge *pro tem*. of a city court held to be a *de facto* officer, whose acts and judgments could not be collaterally attacked. *Briggs v. Voss*..... 418
7. **Judicial Notice.**—Judicial notice taken that Kansas City is now the only city in Kansas having over 50,000 inhabitants. *Parker-Washington Co. v. Kansas City* 726
8. ——— The courts will take notice without proof that a municipality is a city of the second class, where it has been made such under the statute by a public proclamation issued by the governor. *The State v. Ricksecker*..... 496
9. **Public Improvements.**—In an action on a surety bond for material furnished to a contractor to pave certain streets, a demurrer to the answer was held to have been improperly sustained. *Atkin v. Coal Co.*... 768
10. ——— A contract for paving the streets of a city held void under a statute requiring such contracts to be let to the lowest bidder, and contrary to public policy in restricting competition. *Surety Co. v. Brick Co.* 196
11. ——— The requirement that the petition for public improvements shall specifically describe the material is complied with, where vitrified brick is to be used, by using the words "vitrified brick" and describing the standard of quality desired. *Id.*..... 196
12. ——— Where a contract for paving is void for restricting competition in the purchase of materials, all the proceedings are void, and one furnishing material with knowledge of the facts constituting the illegality cannot recover against the surety on the contractor's bond. *Id.*..... 197
13. ——— The legislature may classify cities according to population for various purposes, and laws applicable to all members of any class may be general laws and have a uniform operation. *Parker-Washington Co. v. Kansas City*..... 722
14. ——— The matter of the method of providing for the cost of street improvements is one with relation to which cities may reasonably be divided into classes upon the basis of population. *Id.*..... 722

CITIES AND CITY OFFICERS—CONTINUED:

15. ——— A law for the government of cities of a certain population is not rendered special in its operation by the fact that there is at the time only one city in the state of the size designated. *Id.*..... 722
16. ——— An extreme case could perhaps be imagined in which a court would be justified in holding that an ostensible classification upon the basis of population was only colorable. *Id.*..... 725
17. ——— A law providing that cities of over 50,000 shall pay for street improvements by issuing tax bills against the property specially benefited instead of negotiable bonds of the corporation held valid. *Id.*... 722
18. ——— The legislature may require persons contracting to improve city streets to give bonds executed by some security company authorized to do business within the state. *Id.*..... 722
19. ——— When a petition for public improvements purports to have the requisite number of signers, and a landowner files a written protest, and the mayor and council consider the petition and protest and order the improvements made, their action is a conclusive determination of the sufficiency of the petition. *Railroad Co. v. Kansas City*..... 571
20. ——— Such landowner cannot question the validity of the proceedings in a suit to enjoin the assessments unless such suit is brought within thirty days from the time the amount of the assessment is ascertained. *Id.* 571
21. **Tax Bills.**—See No. 17.
22. **Violation of Speed Ordinance.**—See “RAILROADS.”
23. **Void Paving Contract.**—See Nos. 9, 10, 12.

CITY COURT (JUDGE OF)—See “OFFICE AND OFFICERS.”

CIVIL CODE CITED—See “STATUTES CITED, CONSTRUED, OR APPLIED.”

CLASSIFICATION BY THE LEGISLATURE—See “CONSTITUTIONAL LAW.”

COLLATERAL ATTACK—See “JUDICIAL SALES;” “JUDGMENTS;” “WILLS,” 5, 6.

COLLATERAL PROVISION—See “CONTRACTS.”

COLLECTION OF DELINQUENT TAXES—See “TAXATION,” 6-11.

COLLUSIVE SETTLEMENT—See “ATTORNEYS,” 33, 34.

COLORABLE DISPUTE AS TO OWNERSHIP—See “JUDGMENTS,” 33.

COMBINATIONS RESTRICTING COMPETITION—See “MONOPOLIES.”

COMITY—See “STATUTORY CONSTRUCTION,” 1, 2.

COMMENCEMENT OF SUIT—See “INJUNCTION.”

COMMENT UPON THE EVIDENCE—See “PRACTICE, DISTRICT COURT.”

COMMON CARRIERS—See "RAILROADS;" "DAMAGES (CABS)," 103-105.

COMMON LAW—See "ATTORNEYS," 26, 27; "PRACTICE, PROBATE COURT," 9, 10; "WILLS," 13; "JURY AND JURORS," 11.

COMMISSION—See "AGENCY;" "MONOPOLIES," 2-4.

COMMISSIONER OF INSURANCE—See "OFFICE AND OFFICERS," 17.

COMMISSIONERS (COUNTY)—See "OFFICE AND OFFICERS."

COMMISSIONERS (RAILROAD)—See "RAILROADS."

CONCEALED DEFENSE—See "CRIMINAL LAW," 73.

CONDEMNATION PROCEEDINGS—See "DAMAGES."

CONDITION BROKEN—See "MORTGAGES."

CONDITION (IMPLIED)—See "CONTRACTS."

CONDITIONS PRECEDENT:

1. **Actions against the State.**—The state cannot be sued in its own courts except with its own consent, clearly conferred by act of the legislature. *The State v. Appleton* 160
2. **Competition.**—Competition in the letting of a paving contract held a condition precedent to a valid and binding contract. *Surety Co. v. Brick Co.*..... 209
3. **Notice of Claim.**—See "RAILROADS."
4. **Payment of Contract Price.**—In a contract to sell mill machinery a provision that a guaranteed capacity shall be demonstrated before payment is not collateral, and the test must be made or waived before an action for the price can be maintained. *Ehrsam v. Jackman*..... 435
5. ——— A contract for the sale of machinery held to contemplate a mill-run demonstration of the guaranteed capacity as a condition precedent to the payment of the purchase-price. *Id.*..... 435
6. ——— Where a mill failed to develop a guaranteed capacity by reason of inferior wheat furnished by the buyer, he could not claim the test was conclusive. *Id.* 436
7. **Payment of Decedent's Debts.**—Heirs suing for possession and partition of real estate acquired by descent are not required to show that the land is not subject to appropriation for the payment of the decedent's debts. *O'Keefe v. Behrens*..... 469
8. **Presentation of Claim.**—The plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action. *Morrill Township v. Fletcher*..... 787
9. **Proof of Conviction.**—Where the charges made against an attorney involve moral turpitude, proof of a conviction is not essential to a disbarment. *In re Smith* 744
10. **Recovery from Parent's Estate.**—An express contract is a condition precedent to a recovery by a child against a parent's estate for services. *Griffith v. Robertson* 666

CONFESSIONS—See "CRIMINAL LAW."

CONFLICT OF LAWS—See "LIMITATION OF ACTIONS."

CONSENT—See "WILLS;" "CRIMINAL LAW."

CONSEQUENTIAL DAMAGES—See "DAMAGES."

CONSIDERATION—See "CONTRACTS;" "MORTGAGES," 10, 28, 29; "TAXATION," 34.

CONSIGNEE—See "PARTIES."

CONSTITUTIONAL LAW:

1. **Amendment of a Statute.**—Statutes which amend existing laws by implication need not contain the section or sections amended. *Parker-Washington Co. v. Kansas City* 722
2. **Classification by the Legislature.**—The limitation of the time within which fraternal beneficiary associations may appeal from a judgment to sixty days after its rendition does not deprive such associations of the "equal protection of the laws," although other litigants have one year within which to perfect an appeal. *Daughters of Justice v. Swift*..... 255
3. ——— Equal protection is secured if the law operates alike on all of the same class, provided the classification is not arbitrary or unreasonable and arises out of the business engaged in or the peculiar manner in which it is conducted. *Id.*..... 259
4. ——— The constitution does not require the same law to be applied to two distinct classes. *Id.*..... 250
5. ——— The legislature may classify cities according to population for various purposes, and laws applicable to all members of any class may be general laws and have a uniform operation. *Parker-Washington Co. v. Kansas City*..... 722
6. ——— The matter of the method of providing for the cost of street improvements is one with relation to which cities may reasonably be divided into classes upon the basis of population. *Id.*..... 722
7. ——— A law for the government of cities of a certain population is not rendered special in its operation by the fact that there is at the time only one city in the state of the size designated. *Id.*..... 722
8. ——— An extreme case could perhaps be imagined in which a court would be justified in holding that an ostensible classification upon the basis of population was only colorable. *Id.*..... 725
9. ——— A law providing that cities of over 50,000 shall pay for street improvements by issuing tax bills against the property specially benefited instead of negotiable bonds of the corporation held valid. *Id.*, 722
10. **Diversion of a Tax.**—An act empowering the commissioners of Gove county to build a court-house held to authorize the use of a part of the general revenue fund. *Smith v. Haney*..... 506
11. ——— Such provision is void by reason of the constitutional provision forbidding the diversion of a tax from the object for which it was levied. *Id.*..... 506

CONSTITUTIONAL LAW—CONTINUED:

12. ——— Such provision is so related to the other provisions of the act that it cannot be said that the legislature would have passed any of them independently of this one, and the entire act is therefore void. *Id.*... 506
13. **Due Process of Law.**—In the absence of a statute no notice is necessary to confer authority upon a probate court to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind. *Foran v. Healy*..... 640
14. **"Equal Protection of the Laws."**—See Nos. 2-4.
15. **General Laws.**—See Nos. 2-9.
16. **Jurisdiction of Supreme Court.**—See "JURISDICTION."
17. **Monopolies.**—See "MONOPOLIES."
18. **Multifarious Statute.**—A statute held not multifarious because it deals with injunctions in respect to such divers matters as taxation, improvident public contracts, and nuisances. *The State v. Tibbits*..... 493
19. **Notice—Appointment of a Guardian.**—See No. 13.
20. **Partial Invalidity of a Statute.**—See Nos. 11, 12.
21. **Privilege of a Witness.**—See "EVIDENCE."
22. **Repeal of a Statute.**—See No. 1.
23. **Retrospective Statute.**—In the absence of any constitutional inhibition the legislature has the power to enact retrospective statutes in certain cases, provided such laws do not interfere with vested rights. *Douglas County v. Woodward*..... 240
24. ——— An act will not be given a retrospective operation unless the intention of the legislature that it shall so operate is unequivocally expressed. *Id.*..... 238
25. **Right to a Speedy Trial.**—See "CRIMINAL LAW."
26. **Special Laws.**—See Nos. 2-9.
27. **Statutory Construction.**—If a statute be open to two interpretations, under one of which it would be constitutional and under the other unconstitutional, the court will adopt the meaning consonant with validity. *In re Burnette*..... 610
28. **Trial by Jury.**—A dispute regarding a boundary does not in a proper sense involve title to real estate and is not a controversy in which a jury trial may be demanded as a matter of right. *Mathis v. Strunk*... 597
29. **Uniform Operation of Laws.**—See Nos. 2-9.
30. **Witness Face to Face.**—Depositions against the accused in a disbarment proceeding are admissible. *In re Burnette*..... 614

CONSTRUCTION—See "CONTRACTS;" "PETITION;" "STATUTORY CONSTRUCTION;" "PRACTICE, SUPREME COURT."

CONSULTATION—See "JURY AND JURORS."

CONTEMPLATED DAMAGES—See "RAILROADS."

CONTEST COURT—See "ELECTIONS."

CONTEST OF A WILL—See "WILLS."

CONTINGENT OFFER TO PAY—See "SURETYSHIP AND GUARANTY."

CONTINUANCE—See "CRIMINAL LAW."

CONTRACTOR'S BOND—See "BONDS."

CONTRACTS:

1. Acquiescence in Terms.—See No. 80.
2. Agency.—See "AGENCY."
3. Assumption of Mortgage.—See "CONVEYANCES."
4. Attorneys.—See "ATTORNEYS."
5. Breach.—See "DAMAGES."
6. Bribery.—See "CRIMINAL LAW."
7. Collateral.—See Nos. 40, 41, 84, 85.
8. Condition Precedent.—See Nos. 84-86.
9. Consideration (See, also, Nos. 48-54).—Between the original parties to a bill or note the consideration may always be inquired into. *Deming v. Wallace*.... 291
10. ——— Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration and permit a *pro tanto* recovery. *The State v. Wilson*... 351
11. Construction.—In interpreting a contract the court should give effect to each word if possible, should take into consideration all its parts in ascertaining the meaning of each particular part, should construe written and printed portions together when they do not contradict each other, and should give weight to the practical construction placed upon the instrument by the parties themselves before litigation arose. *Ehram v. Jackman*..... 485
12. ——— The rule that the law will not imply a relation between parties contrary to their agreement applied. *Smyser v. Fair*..... 778
13. ——— Certain letters construed and held to have established a contract. *Case Co. v. Arnett*..... 774
14. ——— What the parties intended can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions, must be considered. *Hurst v. Manufacturing Co.*..... 430
15. Conveyances.—See "CONVEYANCES."
16. Corporations.—See "CORPORATIONS."
17. Default of Buyer.—See No. 86.
18. Duty to Furnish Cars.—See Nos. 82, 83.
19. Executory.—See Nos. 28, 29.
20. "F. O. B. Cars."—See Nos. 82, 83.
21. Forfeiture (See, also, "SCHOOLS AND SCHOOL-LAND," "RAILROADS," "BONDS," 2, "OFFICE AND OFFICERS," 25).—In an action for wages and expenses under a contract of hiring, an answer which disputes the

CONTRACTS—CONTINUED:

- length of time plaintiff was in defendant's service and pleads payment is insufficient to authorize a forfeiture of all compensation for dishonesty and other flagrant misconduct. *Spaulding v. Pepper*..... 644
22. ——— It was held that a justice of the peace had jurisdiction in an action of forcible detainer against one who had entered into the possession of land under a contract which had become forfeited. *Dineen v. Olson* 379
23. ——— If the defendant had any equitable rights they could be adjusted in a subsequent proceeding. *Id.* 387
24. ——— When in a contract for the sale of real estate it is stipulated that time shall be of the essence of the agreement, and a forfeiture upon default is provided for, such contract will be enforced, unless it would be grossly inequitable. *Cue v. Johnson*..... 558
25. ——— When the right to declare a forfeiture exists the party entitled thereto must assert his right promptly, and his acts must be inconsistent with the continuance of the contract, or he will be held to have waived such right. *Id.*..... 558
26. ——— Where money was paid to plaintiff's agent on a contract for the sale of land, a petition to recover the money on the ground of forfeiture held sufficient against demurrer. *Bowersox v. Hall*..... 99
27. ——— The word "interest" in a clause forfeiting an insurance policy for any change in "interest, title or possession" applies only where the insured owns and insures an interest less than title. *Garner v. Insurance Co.* 127
28. ——— Where the insured owns the title to the property insured, and makes an executory contract to convey it, no change has taken place in interest, title or possession within the meaning of such forfeiture clause. *Id.*..... 128
29. ——— A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees. *Id.*..... 131
30. ——— The constitutional provisions of a fraternal insurance association relating to beneficiary certificates constitute a part of the contract between such association and its members. *Benefit Association v. Wood* 124
31. ——— A monthly assessment paid with the application for membership in an insurance order could not be applied until the constitutional provisions for acceptance had been complied with, and the certificate had not lapsed. *Id.*..... 124
32. **Fraud.**—In a suit to avoid a written contract on the ground of fraud parol evidence is admissible. *Insurance Co. v. Johnson*..... 567
33. ——— In such a suit a defense that the representations were so palpably false that the plaintiff could not have been injured thereby raises a question of fact. *Id.*..... 567

CONTRACTS—CONTINUED:

34. — Parol testimony is competent for the purpose of proving fraud and misrepresentation in procuring the execution of a promissory note, where fraud is pleaded as a defense. *Deming v. Wallace*..... 291
35. — One signing an instrument which he did not read is not estopped to deny fraud in the execution of the contract. *Id.*..... 294
36. — Finding of fraud in the execution of a written contract sustained by the evidence. *Id.*..... 294
37. Guaranty.—See "SURETYSHIP AND GUARANTY."
38. Illegal.—A contract for paving the streets of a city held void under a statute requiring such contracts to be let to the lowest bidder, and contrary to public policy in restricting competition. *Surety Co. v. Brick Co.* 196
39. — Where a contract for paving is void for restricting competition in the purchase of materials, all the proceedings are void, and one furnishing material with knowledge of the facts constituting the illegality cannot recover against the surety on the contractor's bond. *Id.*..... 197
40. — When the party can establish his claim without relying upon the illegal transaction, he can recover; but, if it requires the aid of the illegal contract or transaction, he cannot. *Id.*..... 207
41. — The courts will not permit a recovery on a collateral contract which is so connected with the illegal contract that the immoral purpose is kept in view. *Id.*..... 206
42. — Where a statute, the violation of which makes a contract illegal, is enacted for the protection of one of the parties to the transaction, he can recover notwithstanding he must prove the illegal contract. *Id.*, 208
43. — The penalty is imposed upon but one of the parties, and the law does not consider them *in pari delicto*. *Id.*..... 208
44. — The requirement that the petition for public improvements shall specifically describe the material is complied with, where vitrified brick is to be used, by using the words "vitrified brick" and describing the standard of quality desired. *Id.*..... 196
45. — The statute of 1891 prohibiting combinations to prevent competition among persons engaged in buying and selling live stock is superseded by the general antitrust law of 1897, and is no longer in force. *The State v. Wilson*..... 343
46. — An association engaged in buying and selling live stock, practically controlling that business, which has a by-law forbidding its members to buy or sell for others without charging a stated commission, is a combination to restrict the pursuit of a lawful business, and is a trust. *Id.*..... 343
47. — Charging a commission for purchasing live stock for another, by a member of such a trust, in pursuance of the by-law referred to, is a misde-

CONTRACTS—CONTINUED:

- meanor, and a contract to pay a commission exacted under such circumstances is void. *Id.*..... 343
48. ——— A note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. *Id.*..... 343
49. ——— Where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both of the notes and the mortgage are wholly void. *Id.*..... 343
50. ——— In a prosecution for obtaining money by false pretenses through selling as clear cattle that were in fact mortgaged, the defendant may show that the mortgage, although fair on its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute. *Id.*..... 344
51. ——— The allegation that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage. *Id.*..... 358
52. ——— If any part of a single consideration or either of two separate considerations of a contract is illegal the entire contract is void, although where two promises, one of which is illegal, are made upon a lawful consideration, the promise which is unobjectionable is enforceable. *Id.*..... 351
53. ——— Where one of two considerations, or a distinct part of one consideration, is unlawful, the partial illegality taints the entire transaction, and the contract itself is void. *Id.*..... 351
54. ——— A promise to marry in consideration of consent to sexual intercourse is unenforceable. *Sramek v. Sklenar* 452
55. Implied Condition.—See No. 81.
56. Insurance.—See "INSURANCE."
57. Liability of Administrators.—See No. 99.
58. Married Women.—In Kansas coverture affords no ground for declaring invalid a married woman's contract, even although she possesses no separate estate or separate trade or business. *Harrington v. Lowe*.. 1
59. Master and Servant.—See No. 21.
60. Mortgages.—See "MORTGAGES."
61. Negotiable Instruments.—See "NEGOTIABLE INSTRUMENTS."
62. Offer and Acceptance.—See Nos. 79-81.
63. Oral.—A contract for the employment of a real-estate agent need not be in writing. *Long v. Thompson* 79
64. Parent and Child.—Before a daughter can recover from her mother's estate for services rendered the mother while living with her as a member of the family, there must have been an express contract

CONTRACTS—CONTINUED:

- that such services should be paid for. *Griffith v. Robertson* 666
65. ——— Evidence to support such express contract need not consist of a formal offer and acceptance; it may be established by any competent testimony. *Id.*, 666
66. ——— A party prosecuting a claim against the estate of a deceased person is competent to testify to conversations had between the deceased and a third person in the presence and hearing of the witness. *Id.* 666
67. ——— When a daughter cares for her mother for several years, under an express contract that payment will be provided for in the will of her mother, who dies intestate, the daughter may recover the reasonable value of such services from the estate of the mother. *Id.* 666
68. **Parol Evidence.**—See Nos. 9, 32, 34, 35.
69. **Part Performance.**—See Nos. 91, 92.
70. **Personal Relation.**—See No. 98.
71. **Promise to Marry** (See, also, "DAMAGES," 3-5).—A promise to marry in consideration of consent to sexual intercourse is unenforceable. *Sramek v. Sklenar*, 452
72. **Publication of Tax Lists.**—A contract for the publication of the personal-property statements of all persons in the county returned by the assessors held to be *ultra vires* and void. *Brown v. The State* 69
73. ——— Injunction will lie to prevent the payment of the contract price. *Id.* 69
74. **Public Improvements.**—See "CITIES AND CITY OFFICERS."
75. **Railroads.**—See "RAILROADS."
76. **Recovery Pro Tanto.**—See No. 10.
77. **Reservation.**—See "RAILROADS," 12, 13.
78. **Restricting Competition.**—See Nos. 38, 39, 45-47.
79. **Sale of Personal Property.**—A request of an offer to buy, the wiring of such offer, giving terms in full, and an answer by the vendor stating that he will sell the produce mentioned, repeating the terms of the offer, held to effect a contract. *Bennett v. Cummings*, 647
80. ——— The time of delivery was mentioned in the request for an offer, a shorter time named in the offer, and the final telegram was silent on the subject. Held, under the circumstances, the seller acquiesced in the time proposed by the buyer. *Id.* 647
81. ——— Where the acceptance of an offer is otherwise sufficient it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply. *Id.* 647
82. ——— Under an agreement to sell merchandise "f. o. b. cars," it is not the duty of the buyer to furnish the cars. *Hurst v. Manufacturing Co.* 422
83. ——— The phrase "f. o. b. cars" means that the seller will do all that is required to accomplish the consignment and shipment of the goods free of expense to the buyer. *Id.* 422

CONTRACTS—CONTINUED:

84. ——— In a contract to sell mill machinery a provision that a guaranteed capacity shall be demonstrated before payment is not collateral, and the test must be made or waived before an action for the price can be maintained. *Ehram v. Jackman*..... 435
85. ——— A contract for the sale of machinery held to contemplate a mill-run demonstration of the guaranteed capacity as a condition precedent to the payment of the purchase-price. *Id.*..... 435
86. ——— Where a mill failed to develop a guaranteed capacity by reason of inferior wheat furnished by the buyer, he could not claim the test was conclusive. *Id.*, 436
87. ——— Where machinery sold under a guaranteed capacity is used by the buyer, pending a test he is not obliged to bring about and the seller can delay, the test is not waived nor the seller relieved from demonstrating its capacity, if such use does not violate the contract or prejudice the seller's rights. *Id.*, 436
88. ——— Certain letters construed and held to have established a contract. *Case Co. v. Arnett*..... 774
89. **Sale of Real Property.**—When in a contract for the sale of real estate it is stipulated that time shall be of the essence of the agreement, and a forfeiture upon default is provided for, such contract will be enforced, unless it would be grossly inequitable. *Cue v. Johnson* 558
90. ——— When the right to declare a forfeiture exists the party entitled thereto must assert his right promptly, and his acts must be inconsistent with the continuance of the contract, or he will be held to have waived such right. *Id.*..... 558
91. ——— In a suit to enforce a parol agreement to convey land, where possession is relied upon as part performance, the character of the possession is of the greatest importance. It must be notorious, exclusive, continuous, and in pursuance of the contract. *Baldwin v. Baldwin*..... 39
92. ——— An instruction that plaintiff is entitled to recover if he has proved that he was placed in possession of the land under the contract held insufficient under the conceded facts. *Id.*..... 39
93. ——— Before specific performance of a parol agreement to convey lands will be enforced the facts relied upon must be established by clear and satisfactory proof. *Id.*..... 46
94. **School-land.**—See "SCHOOLS AND SCHOOL-LAND."
95. **Shipping.**—See "RAILROADS," 56-58, 63-70.
96. **Specific Performance.**—See Nos. 91-93.
97. **Suretyship.**—See "SURETYSHIP AND GUARANTY."
98. **Termination by Death.**—A contract held to have created a personal relation which was dissolved by the death of one of the parties, and did not bind the administrator of the estate. *Campbell v. Faxon*..... 675
99. ——— In the absence of a testamentary direction an administrator of the estate cannot carry on the

CONTRACTS—CONTINUED:

business of the decedent, and if he does so without authority he will be personally bound for the contracts of the business. *Id.*..... 675

100. **Time of Delivery.**—See No. 80.

101. **Time of the Essence.**—See Nos. 24, 25.

102. **Ultra Vires.**—See Nos. 72, 73; also, "CORPORATIONS."

CONTRIBUTION—See "SURETYSHIP AND GUARANTY;" "EJECTMENT," 7.

CONTRIBUTORY NEGLIGENCE—See "DAMAGES."

CONVERSION—See "DAMAGES;" "PRACTICE, DISTRICT COURT," 27.

CONVEYANCES:

1. **Assumption of Mortgage.**—A grantee who assumes a mortgage is liable to the mortgagee, though the note would have been barred by the statute of limitations but for an acknowledgment by the grantor which tolled the statute as to him, provided such acknowledgment was made before the conveyance. *Disney v. Healey* 326

2. **Breach of Warranty.**—See Nos. 3-6.

3. **Covenant of Warranty.**—When land was conveyed by warranty deed, both parties knowing that a claimant occupied it, and the grantor undertook by litigation to clear the title, and represented that he would do so, and the grantee relied thereon, the grantor was estopped in an action on the warranty to plead the statute of limitations. *Railway Co. v. Pratt*..... 210

4. ——— A purchase-money mortgage executed by the grantee of a warranty deed held ineffectual by a failure of consideration. *Harrington v. Lowe*..... 24

5. ——— A grantor by general warranty is liable upon a final judgment evicting the grantee from possession or awarding title to another upon an alleged right antedating the conveyance, provided the grantor has notice to, or does, appear, although the judgment was based on an erroneous finding that he was not the owner at the time of conveyance. *Samson v. Zimmerman* 654

6. ——— The grantor must defend according to his covenant, and if he fails in his defense it is at his own peril. *Id.*..... 654

7. **Eviction.**—See No. 5.

8. **Failure of Consideration.**—See No. 4.

9. **Forfeiture.**—See "CONTRACTS."

10. **Grantor Estopped.**—See Nos. 3, 21.

11. **Innocent Purchaser.**—See No. 20.

12. **Oral Agreement.**—In a suit to enforce a parol agreement to convey land, where possession is relied upon as part performance, the character of the possession is of the greatest importance. It must be notorious, exclusive, continuous, and in pursuance of the contract. *Baldwin v. Baldwin*..... 39

CONVEYANCES—CONTINUED:

13. ——— An instruction that plaintiff is entitled to recover if he has proved that he was placed in possession of the land under the contract held insufficient under the conceded facts. *Id.*..... 39
14. ——— Before specific performance of a parol agreement to convey lands will be enforced the facts relied upon must be established by clear and satisfactory proof. *Id.*..... 46
15. **Part Performance.**—See Nos. 12-14.
16. **Pleading.**—An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath. *O'Keefe v. Behrens*..... 469
17. ——— Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based. *Id.*..... 469
18. **Possession.**—See Nos. 3, 12-14.
19. **Presumption as to Title Conveyed.**—See No. 25.
20. **Quitclaim Deed.**—The grantee of a quitclaim deed held not an innocent purchaser. *Harrington v. Lowe*, 24
21. ——— Where a grantor would be estopped to deny that a deed was effectual, the grantee of his heirs by quitclaim had no standing to deny it. *Id.*..... 24
22. ——— A part owner not in receipt of any income from the land, and who has not ousted his cotenant, held entitled to a lien for taxes paid in excess of his proportion, which he may enforce against his cotenant's grantee claiming by a quitclaim deed. *Young v. Bigger* 146
23. **Tax Deed.**—See "TAXATION."
24. **Upland of Tract Partly Submerged.**—If the owner of land, a part of which has been submerged, convey the upland and retain title to the remainder, the purchaser, upon the reappearance of the submerged portion, can include it within his boundary only by the process of accretion or reliction. *Fowler v. Wood*.... 512
25. ——— If a private owner grant land, bounding it upon a river, the presumption that it carries title as far as he owns is rebuttable, the question being one of intention; and when the intention is ascertainable from the record of a proceeding, or the face of an instrument, other evidence is inadmissible. *Id.*..... 513

CONVICT'S ESTATE—See "CRIMINAL LAW."

CORPORATIONS:

1. **Authority of Secretary.**—A secretary of a corporation cannot ordinarily, without special authority, make contracts which will bind the company. *Ross v. Eastham* 464
2. **Combinations Restricting Competition.**—See "MONOPOLIES."
3. **Contracts.**—See Nos. 1, 16-19.

CORPORATIONS—CONTINUED:

4. **Foreign.**—The defense that a foreign corporation has not been granted authority to carry on business within the state is not raised by a general denial, but must be specially pleaded. *Leonard v. Steel Co.*..... 79
5. ——— A managing agent within the meaning of the term of the statute providing for the service of summons upon a managing agent of a foreign corporation defined. *Betterment Co. v. Reeves.*..... 107
6. ——— The various methods provided by statute for obtaining service of process on foreign corporations are cumulative. *Id.*..... 107
7. ——— Statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended. *Id.*..... 114
8. **Insurance.**—See "INSURANCE."
9. **Liability of Managing Officers.**—See No. 15.
10. **Managing Agent.**—See No. 5.
11. **Municipal Corporations.**—See "CITIES AND CITY OFFICERS;" "OFFICE AND OFFICERS;" "SCHOOLS AND SCHOOL-LAND."
12. **Notice of Powers.**—See Nos. 16-19.
13. **Railroads.**—See "RAILROADS."
14. **Service of Process.**—See Nos. 5-7.
15. **Trust Companies.**—Where money was collected for another by a trust company, and mingled with its funds, in violation of directions to remit, and was thereby lost, the managing agents of the trust company, who knowingly permitted the misappropriation, were held personally liable, although there was no intent to defraud. *Sweet v. Savings Bank.*..... 47
16. **Ultra Vires Contract.**—A joint maker of a note with a corporation which does not have the power to issue such an obligation may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation. *Scott v. Bankers' Union,* 576
17. ——— The purchaser of a note executed by a corporation not having the legal power to issue such an obligation cannot recover thereon from such maker, even when the note is taken in good faith and for value. *Id.*..... 576
18. ——— A fraternal-insurance corporation whose charter does not expressly authorize it to issue notes has no implied power to do so when such authority is unnecessary to the exercise of power given or to accomplish the corporate purposes. *Id.*..... 575
19. ——— Every person dealing with a corporation or with its obligations is bound to take notice of the power possessed by such corporation and of the purpose for which it was created. *Id.*..... 575

CORRECTION OF THE RECORD—See "PRACTICE, DISTRICT COURT."

COSTS—See "JUDGMENTS."

COTENANCY—See "EJECTMENT," 9, 10; "TAXATION;" "PRACTICE, SUPREME COURT," 44.

COUNSEL—See "ATTORNEYS."

COUNTIES:

1. Alteration of a Public Road.—See "HIGHWAYS."
2. Delinquent Taxes.—See "TAXATION."
3. Erection of a Court-house.—See "TAXATION," 14-16.
4. Fees and Salaries.—See "OFFICE AND OFFICERS," 26.
5. Officers.—See "OFFICE AND OFFICERS."
6. Publication of Tax Lists.—See "TAXATION."
7. Seals.—See "TAXATION."
8. *Ultra Vires* Contract.—See "TAXATION," 27, 28.
9. Use of General Fund.—See "TAXATION," 14-16.

COUNTS (DEFECTIVE)—See "CRIMINAL LAW."

COUNTS (ELECTION OF)—See "PRACTICE, DISTRICT COURT."

COVENANT OF WARRANTY—See "CONVEYANCES."

COVERTURE—See "HUSBAND AND WIFE," 13.

CREDIBILITY OF A WITNESS—See "EVIDENCE."

CREDITORS—See "SURETYSHIP AND GUARANTY," 19, 20; "ESTOPPEL AND WAIVER," 3; "PARTIES."

CRIMINAL CODE CITED—See "STATUTES CITED, CONSTRUED, OR APPLIED."

CRIMINAL LAW:

1. Acquittal.—See No. 83.
2. Admissions.—See No. 29.
3. Adultery.—See No. 52.
4. Appeal Bond.—Upon an appeal from the police court, the bond was signed by the defendant alone and approved by the police judge. It was error for the district judge to dismiss the appeal because the bond lacked the signature of a surety. *Ottawa v. Johnson*, 165
5. Bribery (See, also, Nos. 11, 12, 27-31, 58, 87-89).—A member of a board of education, who accepts money to influence his opinion, judgment and action in favor of letting or causing to be let a contract for cleaning school buildings is guilty of bribery, although the board had referred the matter of cleaning buildings to the superintendent, who was an employee but not a member of the board, where the member charged with the offense let the contract with the approval of the superintendent. *The State v. Campbell*. 690
6. ——— Testimony that the contractor who paid defendant the bribe soon afterward took a similar contract with an individual at a much lower price is competent evidence of the intent with which the money was received. *Id.*. 690
7. ——— Where defendant is shown to have cashed a check payable to his order for the amount he is

CRIMINAL LAW—CONTINUED:

- charged with receiving, drawn by the person from whom he received the bribe, the check is competent to establish the receipt of the money. *Id.*..... 690
8. ——— A letter corroborating what defendant had previously sworn to could not have been material to disprove the charge of bribery. *Id.*..... 719
9. **Burden of Proof.**—See No. 77.
10. **Burglary** (See, also, No. 53).—Judgment of conviction of burglary in the second degree affirmed. *The State v. Logan*..... 780
11. **Calling of Witnesses.**—In a criminal action the state is not obliged to place upon the stand every witness whose name is indorsed upon the indictment. *The State v. Campbell*..... 690
12. ——— Defendant has no right to rely upon the attendance of a witness merely because the state may have caused a subpoena to issue for such witness. *Id.*, 690
13. **Circumstantial Evidence.**—Before a jury is justified in convicting upon circumstantial evidence alone the circumstances proved must not only all be consistent with the theory of the defendant's guilt, but they must be so strong as to exclude any other reasonable hypothesis. *The State v. Sweizewski*..... 738
14. **Confessions.**—See Nos. 27, 28.
15. **Consent of Girl under Eighteen.**—See No. 43.
16. **Continuance.**—See Nos. 84-86.
17. **Contracts—Illegal.**—See "CONTRACTS."
18. **Convict's Estate.**—An action to recover property belonging to a convict under sentence and imprisonment for a term less than life can only be maintained by a trustee. *New v. Smith*..... 174
19. ——— Where an action to recover a convict's estate was brought in the name of a trustee, and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *Id.*..... 174
20. **Cross-examination of Defendant.**—Cross-examination of defendant in reference to peace proceedings was admissible to affect his credibility. *The State v. Roupetz*..... 665
21. **Defense of Intoxication.**—See Nos. 61, 62.
22. **Delay—Appeal by State.**—See No. 87.
23. **Delay—Application of Defendant.**—See Nos. 84-86.
24. **Discharge.**—See Nos. 83-87.
25. **Election of Counts.**—See No. 46.
26. **Embezzlement.**—See Nos. 46-49.
27. **Evidence—before a Grand Jury.**—Statements by a defendant in a criminal action in denial of guilt before a grand jury are not confessions within the rule requiring them to have been made voluntarily before they are competent evidence against him. *The State v. Campbell*..... 688
28. ——— Testimony before the grand jury in obedience to a subpoena is not involuntary. He may re-

CRIMINAL LAW—CONTINUED:

- fuse to give answers which tend to incriminate him, and by the failure to exercise his privilege his statements become voluntary. *Id.*..... 688
29. ——— Voluntary statements made by a defendant, which do not tend to establish his guilt but are exculpatory, are competent evidence against him as admissions of a party. *Id.*..... 689
30. Evidence—by Grand Jurors.—The statute prohibiting grand jurors from disclosing evidence given before them or the name of any witness, except when lawfully required to testify, is not limited by the statute which permits such evidence in certain cases. *Id.*..... 689
31. ——— Grand jurors may testify to what passed before them when, after the purpose of secrecy imposed by the common law and the statutes has been effected, such disclosure is necessary to further justice or protect public or individual rights. *Id.*..... 689
32. Evidence—Defective Counts.—See No. 48.
33. Evidence of Threats.—Threats of deceased against defendant's brother, not involving defendant, properly excluded. *The State v. Roupetz.*..... 663
34. ——— Statements by deceased that defendant would have to walk over his dead body before defendant should have any of his mother's property was not a threat, and under the circumstances its exclusion was not error. *Id.*..... 665
35. Failure of Proof.—See Nos. 73, 74.
36. Failure to Summon Jury.—See No. 86.
37. Forfeiture of Recognizance.—See No. 50.
38. Former Jeopardy.—See No. 41.
39. Former Judgment.—See No. 58.
40. Fornication.—See No. 52.
41. Incest.—A plea in bar of a prosecution for incest which sets forth that the defendant has been tried for, and acquitted of, the crime of statutory rape upon the same woman, for the same act, is not a good plea. *The State v. Learned.*..... 328
42. ——— In a prosecution for incest it is not a good plea in bar or a ground for quashing the information that the action against the woman has been dismissed for the purpose of making her a witness for the state. *Id.*..... 328
43. ——— A man may be guilty of incest with a girl under eighteen years of age. *Id.*..... 328
44. ——— An information charging incest by a married man and his granddaughter, a single woman, was sufficient although it did not allege that they committed adultery or fornication with each other. *Id.*..... 329
45. Indictment.—See Nos. 11, 12, 58.
46. Information (See, also, Nos. 68-71).—Where an information contains several counts, intended to charge the same offense in different ways, and their allega-

CRIMINAL LAW—CONTINUED:

- tions are not inconsistent, it is not error to refuse to require the state to elect upon which one it will rely. *The State v. Ricksecker*..... 495
47. — Where an information charges substantially the same offense in several counts a verdict of guilty which fails to refer to any specific count is sufficient, and will be regarded as a finding of guilty upon all of them. *Id.*..... 495
48. — In such a case, if all the evidence be admissible under one count, which is good, the fact that other counts are not good or fail to bring the case within the statute under which they were drawn is not fatal to conviction. *Id.*..... 495
49. — Where an information contains one good count, and several others which repeat its allegations, with others which are unnecessary and do not change the character of the offense, failure to instruct upon such additional matters will not avail defendant, where no prejudice results to him with respect to his trial upon such good count. *Id.*..... 495
50. — Where defendant declined to plead or answer to an amended information his appearance bond was properly adjudged forfeited. *Jones v. The State*.... 771
51. — The dismissal of an action against one joint defendant in a prosecution for incest to make her a witness for the state is not a ground for quashing the information against the other defendant. *The State v. Learned* 328
52. — An information charging incest by a married man and his granddaughter, a single woman, was sufficient although it did not allege that they committed adultery or fornication with each other. *Id.*... 329
53. **Instructions** (See, also, No. 49).—An instruction in a criminal case which implies that each juror is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous. *The State v. Logan*..... 730
54. — Where testimony in a criminal case is withdrawn by the court, who states to the jury that whenever testimony is ruled out they are not to consider it, denial of a request for a written instruction to disregard such testimony is not error; and a written instruction to consider all the evidence given is neither erroneous nor misleading. *The State v. Roupetz* 663
55. — Erroneous instructions relating to murder were immaterial, defendant having been convicted of an inferior crime. *Id.*..... 665
56. **Intent in Receiving Money**.—See No. 6.
57. **Intoxicating Liquors**.—See "INTOXICATING LIQUORS."
- 57a. **Joint Defendants**.—See No. 51.
58. **Law of the Case**.—A former judgment of this court holding an indictment sufficient in substance is the law of the case. *The State v. Campbell*..... 689
59. **Manslaughter**.—See Nos. 20, 33, 34, 54, 55, 77.

CRIMINAL LAW—CONTINUED:

60. **Motion to Quash.**—See No. 51.
61. **Murder** (See, also, Nos. 55, 83-86).—Intoxication is not of itself a defense to a charge of murder in the first degree. *Zibold v. Reneer*. 320
62. ——— For a person to be too drunk to entertain an intent to kill it would seem that he would have to be too drunk to entertain an intent to shoot. *Id.*. 320
63. **Names Indorsed on Indictment.**—See Nos. 11, 12.
64. **Newly Discovered Evidence.**—See No. 8.
65. **New Trial.**—New trials may be awarded in criminal cases upon the grounds for which new trials may be granted in civil cases, if such procedure is not inconsistent with other provisions of the criminal code. *The State v. Appleton*. 160
66. ——— The provision authorizing new trials in criminal cases for like causes as in civil cases and the provision for instituting a proceeding to obtain a new trial within one year after final judgment do not authorize a proceeding against the state to set aside a judgment of conviction of a public offense and obtain a new trial. *Id.*. 160
67. ——— The rule is that as statutes giving the power to sue the state are in derogation of a sovereign power they should be construed strictly. *Id.*. 164
68. **Obtaining Money by False Pretenses.**—In a prosecution for obtaining money by false pretenses by selling property encumbered by a mortgage under the representation that it is clear, the information need not show whether the mortgagee is a corporation or a partnership. *The State v. Wilson*. 334
69. ——— In such a prosecution an allegation of the information that at the time of the sale the property was encumbered by a mortgage sufficiently charges that the mortgage was unpaid. *Id.*. 335
70. ——— In such a prosecution the proof of a mortgage given for \$13,366.80, the amount stated in the information being \$13,336.80, is not a fatal variance. *Id.*. 335
71. ——— In such a prosecution the allegation of the information that the mortgage had been by the mortgagee assigned to, and was owned by, a bank and one Hax was sustained by the proof. *Id.*. 335
72. ——— The fact that a draft charged to have been fraudulently obtained was made payable to defendant "for the use of" the person alleged to have been defrauded did not conclusively show that the defendant acquired title to it only as a trustee. *Id.*. 335
73. ——— In a prosecution for obtaining money by false pretenses through selling as clear cattle that were in fact mortgaged, the defendant may show that the mortgage, although fair on its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute. *Id.*. 344
74. ——— The allegation that a defendant obtained money by false pretenses through the sale of prop-

CRIMINAL LAW—CONTINUED:

- erty represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage. *Id.*..... 358
75. **Perjury.**—A mortgage given before final proof does not stand in the way of the claimant's honest oath upon final proof. *Stark v. Morgan*..... 463
76. **Plea in Bar.**—See Nos. 41, 42.
77. **Presumption of Good Character.**—The presumption of good character does not stand until overcome beyond a reasonable doubt, it may be overthrown by evidence less conclusive. *The State v. Roupetz*..... 665
78. **Privilege of a Witness.**—See Nos. 27, 28.
79. **Proceeding to Set Aside Judgment.**—See No. 66.
80. **Proof of Receipt of Money.**—See No. 7.
81. **Rape.**—A judgment of conviction for carnally knowing a girl under eighteen years of age affirmed. *The State v. Rowland*..... 790
82. **Reasonable Doubt.**—See No. 77.
83. **Right to Speedy Trial.**—The discharge of a person under indictment when not brought to trial, as provided in section 221 of the criminal code, amounts to acquittal of the offense charged. *The State v. Dewey*, 735
84. ——— In determining whether a person held to bail is entitled to be discharged under section 221 of the criminal code, it is proper to count the terms of court held after indictment found or information filed, omitting any term at which the delay happened upon his application. *Id.*..... 739
85. ——— Any term at which he has consented to the delay cannot be claimed as one at which he should have been brought to trial; but a delay ordered by the court cannot be regarded as happening on his application merely because he fails to object. *Id.*..... 739
86. ——— The failure to provide for the attendance of a jury must be regarded as one of the very things the constitutional guaranty of a speedy trial was designed to meet. *Id.*..... 742
87. ——— The terms of court which intervene pending an appeal by the state are not to be counted in determining whether a person under indictment and held to bail should be discharged because not brought to trial before the end of the third term of court. *The State v. Campbell*..... 688
88. **Statutory Construction.**—The rule that the adoption of a statute from another state includes the construction of it by the courts of that state is a general one, to which there are exceptions. *Id.*..... 689
89. ——— Where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was adopted is opposed to the weight of reason and authority, or against the general policy of our laws, such construction will not be followed. *Id.*..... 689

CRIMINAL LAW—CONTINUED:

90. *Varlance*.—See Nos. 68-71.91. *Verdict—Sufficiency*.—See No. 47.

CROSS-EXAMINATION OF DEFENDANT—See “CRIMINAL LAW.”

CROSSING—See “RAILROADS,” 34-36.

CUSTODY OF BALLOTS—See “ELECTIONS.”

D.

DAMAGES:

1. *Aggravation*.—See Nos. 3-5.
2. *Assumption of Risk*.—See No. 80.
3. *Breach of Contract*.—In an action for breach of promise to marry, it was not error to deny a motion to strike out evidential facts pleaded in aggravation of damages. *Sramek v. Sklenar*..... 450
4. ——— Even if such facts are redundant and surplusage, and could be proved without being pleaded, it is within the discretion of the court to strike out or retain them. *Id.*..... 450
5. ——— Evidence that after a contract to marry had been made the man seduced the woman may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out. *Id.*..... 450
6. ——— In a contract to sell mill machinery a provision that a guaranteed capacity shall be demonstrated before payment is not collateral, and the test must be made or waived before an action for the price can be maintained. *Ehrsam v. Jackman*..... 435
7. ——— A contract for the sale of machinery held to contemplate a mill-run demonstration of the guaranteed capacity as a condition precedent to the payment of the purchase-price. *Id.*..... 435
8. ——— Where a mill failed to develop a guaranteed capacity by reason of inferior wheat furnished by the buyer, he could not claim the test was conclusive. *Id.*..... 436
9. ——— Where machinery sold under a guaranteed capacity is used by the buyer, pending a test he is not obliged to bring about and the seller can delay, the test is not waived nor the seller relieved from demonstrating its capacity, if such use does not violate the contract or prejudice the seller's rights. *Id.*.. 436
10. ——— Under an agreement to sell merchandise “f. o. b. cars,” it is not the duty of the buyer to furnish the cars. *Hurst v. Manufacturing Co.*..... 422
11. ——— The phrase “f. o. b. cars” means that the seller will do all that is required to accomplish the consignment and shipment of the goods free of expense to the buyer. *Id.*..... 422
12. ——— A request of an offer to buy, the wiring of such offer, giving terms in full, and an answer by

DAMAGES—CONTINUED:

- the vendor stating that he will sell the produce mentioned, repeating the terms of the offer, held to effect a contract. *Bennett v. Cummings*. 647
13. — The time of delivery was mentioned in the request for an offer, a shorter time named in the offer, and the final telegram was silent on the subject. Held, under the circumstances, the seller acquiesced in the time proposed by the buyer. *Id.*. 647
14. — Where the acceptance of an offer is otherwise sufficient it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply in any event. *Id.*. 647
15. — A stipulation in a shipping contract that written notice of a claim should precede a recovery for any injury to stock during transportation does not apply to damages such as loss of market or depreciation in the market price occasioned by the carrier's delay. *Railway Co. v. Poole*. 466
16. — It does apply to shrinkage in weight. *Id.*. . . . 468
17. — Agreements of this character are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed. *Id.*. 468
18. — The character of the shipment required the carrier to transport the cattle with reasonable dispatch. *Id.*. 469
19. **Breach of Covenant.**—A grantor by general warranty is liable upon a final judgment evicting the grantee from possession or awarding title to another upon an alleged right antedating the conveyance, provided the grantor has notice to, or does, appear, although the judgment was based on an erroneous finding that he was not the owner at the time of conveyance. *Samson v. Zimmerman*. 654
20. — The grantor must defend according to his covenant, and if he fails in his defense it is at his own peril. *Id.*. 654
21. — When land was conveyed by warranty deed, both parties knowing that a claimant occupied it, and the grantor undertook by litigation to clear the title, and represented that he would do so, and the grantee relied thereon, the grantor was estopped in an action on the warranty to plead the statute of limitations. *Railway Co. v. Pratt*. 210
22. **Condemnation Proceedings.**—In a condemnation proceeding for a perpetual easement in an entire tract of land which has only a surface value, the basis of the owner's right of recovery is the value of the land, the same as if the fee had also been appropriated. *Dethample v. Irrigation Co.*. 54
23. — In such a proceeding the only question to be submitted to a jury is the value of the land at the time of condemnation, and it is erroneous for the court to instruct the jury that only an easement was appropriated, and that the fee remains in the owner,

DAMAGES—CONTINUED:

- unless they are further instructed that in determining the owner's damages no value should be attached to the remaining fee. *Id.*..... 54
24. ——— Where witnesses who were not qualified to testify to market value were permitted to do so the court properly withdrew their testimony from the jury. *Id.*..... 56
25. ——— The opinion of a qualified witness as to the value of the land was properly admitted. *Id.*..... 56
26. ——— In a condemnation proceeding it is error to permit the jury, as a basis for estimating the value of the land, to consider evidence of the purchase-price. *Id.*..... 57
27. ——— Condemning as much land as was then deemed necessary did not exhaust defendant's power to make a further appropriation. *Hurd v. Railway Co.*..... 86
28. ——— As a matter of law the mere failure of a railroad company for any fixed period to complete a track upon a right of way acquired by condemnation does not work a forfeiture of its rights, where there has been no adverse possession. *Hamlin v. Railway Co.*... 565
29. ——— A contract by a railroad company reserving to a landowner an undergrade crossing, which was taken into account by the condemnation commissioners in the award of damages, is binding on both parties. *Railway Co. v. Wynkoop.*..... 590
30. ——— The landowner cannot insist that the opening shall remain in the same form, nor as wide as it was originally left, but is entitled to such an undergrade crossing as will meet the ordinary necessities of a farm. *Id.*..... 595
31. **Consequential.**—See Nos. 59, 60.
32. **Contemplated by the Parties.**—See Nos. 18, 44, 45.
33. **Contributory Negligence.**—A trespasser upon a railroad-track who took no precautions, and was injured, held guilty of contributory negligence which barred a recovery. *Limb v. Railroad Co.*..... 220
34. ——— In an action for injury to a passenger it was not shown that a running of the train at an illegally high rate of speed contributed to the accident. *Railroad Co. v. Brown.*..... 236
35. ——— In a personal-injury case, where the inference of contributory negligence seemed justifiable, plaintiff's evidence in rebuttal was not subject to the objection that it based one presumption upon another. *Railway Co. v. Brickell.*..... 274
36. ——— In a personal-injury case, where plaintiff's evidence was demurred to on the ground of contributory negligence, the demurrer was properly overruled. *Id.*..... 274
37. ——— An instruction as to the burden of proving contributory negligence was proper when considered with other instructions given. *Id.*..... 278
38. ——— Held that contributory negligence was not a good defense to an action for injuries to one licensed

DAMAGES—CONTINUED:

- to be upon property controlled by an elevator company but owned by the defendant. *Railway Co. v. Taylor* 482
39. ——— We do not understand it to be the duty of a person, when rightfully in a place, which under ordinary circumstances is safe, to anticipate danger which arises from the negligence of another. *Id.*..... 485
40. **Conversion.**—Where goods consigned by the owner to an agent were delayed in transit and converted by the carrier the consignee had such a special interest that he could maintain an action for the value of the property. *Railway Co. v. Implement Co.*..... 295
41. ——— The consignee holds the amount recovered in trust for the owner after deducting his commission. *Id.* 295
42. ——— Where the damages caused by the delay in transit exceed the amount of the freight bill the consignee may demand the delivery without payment of the freight. A refusal to deliver amounts to a conversion. *Id.* 295
43. ——— In such a case the carrier's lien is extinguished. *Id.* 302
44. ——— Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. *Id.* 295
45. ——— A carrier deemed to have had notice that machines consigned were for immediate sale, and that a delay in delivery until after the thrashing season would defeat the purpose of the shipment. *Id.*..... 295
46. ——— In an action by a consignee who had sold goods upon commission which had been delayed in transit and converted, the measure of damages was the price at which the goods had been sold. *Id.*..... 295
47. ——— Where money was collected for another by a trust company, and mingled with its funds, in violation of directions to remit, and was thereby lost, the managing agents of the trust company, who knowingly permitted the misappropriation, were held personally liable, although there was no intent to defraud. *Sweet v. Savings Bank.*..... 47
48. ——— One claiming to be an equitable owner held not to be entitled to maintain an action based upon title to the land for the conversion of crops. *Edwards v. Sourbeer* 227
49. **Death by Wrongful Act.**—See Nos. 75, 87-89.
50. **Defective Highway.**—See Nos. 73, 74.
51. **Depreciation of Market.**—See Nos. 15-18.
52. **Emergency.**—See No. 104.
53. **Excessive Verdict.**—See Nos. 87-89, 95, 108.
54. **Expenses.**—See No. 105.
55. **Injury by Fire.**—See "RAILROADS."

DAMAGES—CONTINUED:

56. **Injury by Trespassing Cattle.**—The bill of particulars involved examined and held not to state a cause of action for trespass on real estate within the meaning of the justices' code. *Wilkins v. Lee*..... 321
57. ——— The bill of particulars should be given a liberal interpretation in favor of jurisdiction. *Id.*..... 323
58. **Injury to Stock in Transit.**—See "RAILROADS."
59. **Injury to Wife.**—Where a wife was injured in her means of support by an act committed by her intoxicated husband, the person who furnished the liquor held liable to her in damages. *Zibold v. Reneer*..... 312
60. ——— The statute authorizes a recovery for both proximate and remote injuries. *Id.*..... 312
61. ——— An allegation in her petition that her husband had been convicted of murder in the first degree was not conclusive that he was not intoxicated when he committed the homicide. *Id.*..... 312
62. ——— Persons engaged in a business prohibited by law, which enriches them and makes paupers and criminals of others, have no complaint against a liberal construction of a statute to make them responsible in damages to those injured as a result of the illegal traffic. *Id.*..... 318
63. **Loss of Market.**—See Nos. 15-18.
64. **Malicious Prosecution.**—An instruction that actions for malicious prosecution have never been favored would have been erroneous. *Reynolds v. Dunlap*..... 759
65. ——— What is, and what is not, the test of probable cause discussed. *Id.*..... 759
66. ——— The failure of a party to secure release upon his own recognizance did not prove conclusively that he attached small importance to his arrest or deprive him of the right to damages on the ground that he did not consider himself injured. *Id.*..... 759
67. **Market Value.**—See Nos. 24-26.
68. **Mental Suffering.**—See No. 95.
69. **Misappropriation of Funds.**—See No. 47.
70. **Non-delivery of Freight.**—See "RAILROADS."
71. **Nurse Hire.**—See No. 105.
72. **Personal Injuries.**—It is error to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case. *Avery v. Railroad Co.*..... 563
73. ——— A judgment awarding damages to parents for the death of a child caused by a defective highway affirmed. *Morrill Township v. Fletchall*..... 787
74. ——— The plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action. *Id.*..... 787

DAMAGES—CONTINUED:

75. ——— In an action for damages for a death by wrongful act the trial court erred in sustaining a demurrer to the plaintiff's evidence. *Hurdle v. Railway Co.*..... 769
76. ——— A physician may not give his conclusions as to the permanency of an injury based partially on the history of the injury detailed to him by the patient or others and partially on his own examination. *Betterment Co. v. Reeves.*..... 107
77. ——— A physician may testify to the condition of the patient as he found him, whether suffering from pain, and to utterances or exclamations of pain, and he may also give the patient's statement as to the location of the pain causing such exclamations. *Id.*... 118
78. ——— Where an ordinance required railroad-tracks to be constructed level with street grades, but there was no proof of the violation of the ordinance, it was not error to exclude testimony that defendant's track was above the surface of the street. *Billings v. Railroad Co.*..... 757
79. ——— The provisions of an ordinance regulating the speed at which cars should be operated were said to refer to ordinary operation, and not to exceptional acts in clearing the tracks of snow. *Id.*..... 757
80. ——— Plaintiff, who was a machinist's helper and was injured by a chip which flew from a steel chisel, assumed the risk of his employment; and as he was a man of maturity, the omission to warn him of the danger was not culpable negligence. *Railway Co. v. Weikal* 763
81. ——— A trespasser upon a railroad-track who took no precautions, and was injured, held guilty of contributory negligence which barred a recovery. *Limb v. Railroad Co.*..... 220
82. ——— When the facts upon which a question of negligence depends are in dispute, the question is one to be answered by the jury. *Railroad Co. v. Brown.*... 233
83. ——— Where the facts are not in dispute, and only one inference or deduction is to be drawn from them, they present a question of law for the court. *Id.*..... 233
84. ——— When a passenger-train is approaching a station, and after the brakemen have called the name of the station, it is not negligence for the trainmen to open the side door and the floor door of a vestibule and leave them while open till the station is reached. *Id.* 233
85. ——— Where there are no witnesses to a death which occurs to a passenger, and circumstances are sufficient to justify the conclusion that the cause of the death was wrongful, the jury may infer ordinary care on the part of the injured person from the instinct of self-preservation. *Id.*..... 235
86. ——— In an action for injury to a passenger it was not shown that a running of the train at an illegally high rate of speed contributed to the accident. *Id.*... 236

DAMAGES.—CONTINUED:

87. ——— A verdict for damages for death by wrongful act held excessive, where it appeared that deceased was sixty-six years old, with no one legally dependent upon him, and in poor circumstances. *Railway Co. v. McLaughlin* 248
88. ——— Where income is the test of the measure of damages the income must be that derived from the personal exertions of the deceased in his business as distinguished from income from property or investments. *Id.*..... 251
89. ——— Where facts warrant a recovery for the loss of a parent's counsel and services it is held that the damages must be limited to such as would be of pecuniary value. *Id.*..... 254
90. ——— Where a private road crosses a railroad-track by means of a subway, the omission to give warning of the approach of a train affords no ground of recovery for injuries by one whose horse was frightened by a passing train after he had driven through the subway and was traveling on a road parallel with the track. *Railroad Co. v. Morrison*..... 265
91. ——— The non-liability of the company is not affected by the fact that the place where the plaintiff's horse was frightened was one of peculiar danger because the road was confined in a narrow lane by a barbed-wire fence. *Id.*..... 265
92. ——— In a personal-injury case, where plaintiff's evidence was demurred to on the ground of contributory negligence, the demurrer was properly overruled. *Railway Co. v. Brickell*..... 274
93. ——— In a personal-injury case, where the inference of contributory negligence seems justifiable, plaintiff's evidence in rebuttal was not subject to the objection that it based one presumption upon another. *Id.*..... 274
94. ——— An instruction as to the burden of proving contributory negligence was proper when considered with other instructions given. *Id.*..... 278
95. ——— Where the testimony warranted damages for physical and mental pain, loss of time, and permanent injury, and the general verdict was reasonable, but in answer to special questions relating only to mental suffering the jury said the entire sum was allowed for that element, the failure to allow for other elements of damages did not indicate passion or prejudice, and the verdict was not excessive. *Railway Co. v. Wade*..... 359
96. ——— Testimony by physicians and others of expressions of pain by plaintiff held admissible. *Id.*... 360
97. ——— A person while upon premises controlled by an elevator company, with its consent, is not a trespasser as to a railway company that owns the land upon which the elevator building stands. *Railway Co. v. Taylor*..... 482

DAMAGES—CONTINUED:

98. ——— Held that contributory negligence was not a good defense to an action for injuries to one licensed to be upon property controlled by an elevator company but owned by the defendant. *Id.*..... 482
99. ——— We do not understand it to be the duty of a person, when rightfully in a place, which under ordinary circumstances is safe, to anticipate danger which arises from the negligence of another. *Id.*..... 485
100. ——— Before an employee can recover for injuries resulting from a defective appliance on a locomotive, of which the company had no actual knowledge, he must show that it had existed for such a length of time that the company should have discovered and remedied it. *Railway Co. v. Dorr*..... 486
101. ——— Where a second effort to obtain a specific answer failed, it is not to be presumed that a better result would have been obtained by still other efforts; nor did the defendant waive its right to object to the finding by failing to request to have the effort repeated. *Id.*..... 487
102. ——— There was a finding that the injury would not have occurred but for the defect; that the company had no actual knowledge of its existence; that it had existed "for some time previous to the accident." Held that the latter finding is too indefinite to support a recovery. *Id.*..... 486
103. ——— Proprietors of cabs carrying passengers for hire are liable for all injuries caused by their failure to provide suitable vehicles, safe horses and harness, and a competent, careful driver. *Lewark v. Parkinson* 553
104. ——— In an action against a hack line for injuries to a passenger by the team's becoming frightened, an instruction that the carrier was not liable for the servant's mistaken judgment in an emergency or failure to act promptly when there was no time for deliberation was properly refused. *Id.*..... 553
105. ——— Necessary and reasonable expenses incurred by an injured passenger, including nurse hire, are recoverable from the carrier, although the services were performed by a member of plaintiff's family. *Id.* 553
106. Probable Cause.—See No. 65.
107. Proximate Cause.—See Nos. 59, 60.
108. Punitive.—In an action for fraud in a sale of bank stock, where the court erred in including items in its computation of the value of the stock, the amount allowed in excess of the actual value was not permitted to stand as punitive damages. *Borders v. Carroll*.... 766
109. Rents and Profits.—See "ACCOUNTS AND ACCOUNTING," 4.
110. Services by Plaintiff's Family.—See No. 105.
111. Shrinkage in Weight.—See "RAILROADS," 56, 56a.
112. Time for Deliberation.—See No. 104.

DEATH BY WRONGFUL ACT—See "RAILROADS."

DEATH OF PRINCIPAL—See "AGENCY."

DECEIT—See "FRAUD."

DEEDS—See "CONVEYANCES;" "TAXATION;" "JUDICIAL SALES," 1, 2, 6-9.

DE FACTO JUDGE—See "OFFICE AND OFFICERS."

DEFAULT IN PAYMENT—See "SCHOOLS AND SCHOOL-LAND," 3; "TAXATION."

DEFAULT OF BUYER—See "CONTRACTS."

DEFECTIVE APPLIANCE—See "RAILROADS."

DEFECTIVE COUNTS—See "CRIMINAL LAW."

DEFECTIVE HIGHWAY—See "HIGHWAYS."

DEFENSE (WITHDRAWAL)—See "PRACTICE, DISTRICT COURT."

DEFINITIONS—See "WORDS AND PHRASES."

DEFLECTION OF STREAM—See "WATERS AND WATER COMPANIES."

DELAY—See "NEGOTIABLE INSTRUMENTS;" "CRIMINAL LAW."

DELINQUENT TAXES—See "TAXATION."

DELIVERY (EFFECT OF FAILURE)—See "RAILROADS."

DELIVERY F. O. B. CARS—See "CONTRACTS," 82, 83.

DEMAND OF PAYMENT—See "NEGOTIABLE INSTRUMENTS."

DEMURRER:

1. Answer.—A demurrer will not raise the question of inconsistency or departure in pleading. *Walters v. Chance* 680
2. ——— Where a paving contract was void for restricting competition, and an action was brought to recover from the surety on the contractor's bond for material, an answer setting up the facts constituting the illegality and stating that the material was furnished with knowledge of such facts states a good defense. *Surety Co. v. Brick Co.*..... 197
3. Departure.—See No. 1.
4. Evidence.—Upon a demurrer to the evidence, if there is any testimony tending to establish the material facts necessary to sustain the plaintiff's cause of action the demurrer should be overruled. *Duncan v. Huse* 432
5. ——— A demurrer to evidence raises nothing but a question of law, and it is impossible for its decision to be a decision of the issues of fact. *Wagner v. Railway Co.* 286
6. ——— In a personal-injury case, where plaintiff's evidence was demurred to on the ground of contributory negligence, the demurrer was properly overruled. *Railway Co. v. Brickell*..... 274

DEMURRER—CONTINUED:

7. ——— In an action for damages for a death by wrongful act the trial court erred in sustaining a demurrer to the plaintiff's evidence. *Hurdle v. Railway Co.* 769
8. ——— It is error to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case. *Avery v. Railroad Co.*..... 563
9. Final Determination.—See Nos. 15-17.
10. Judgment.—See Nos. 12, 13, 15-17.
11. Petition.—A petition for an agent's commission held good against demurrer. *Long v. Thompson*..... 76
12. ——— When a demurrer contains several grounds, and is sustained, the record should show upon what ground the order is made. *Walters v. Chance*..... 682
13. ——— Where the record does not show upon which of several grounds a demurrer to a petition was sustained, the court may at a subsequent term amend the record to show that fact, if it be established by clear and satisfactory proof. *Martindale v. Battey*..... 92
14. ——— Where there is no motion to make the petition more definite and certain the pleading must be liberally construed. *Long v. Thompson*..... 78
15. ——— A judgment for defendant upon sustaining a demurrer to a petition is a final determination, and until set aside no further proceedings can be had looking to a trial of the issues between the parties. *Martindale v. Battey*..... 92
16. ——— No question is here involved as to the effect of the judgment as an adjudication if pleaded in any subsequent action between the parties. *Id.*..... 95
17. ——— A petition was demurred to on several grounds, including misjoinder and want of facts. The demurrer was sustained for want of facts, but the record did not show on what ground, and judgment was given for defendant, which was affirmed on the ground of misjoinder. The district court has no power at a subsequent term to permit the filing of separate petitions. *Id.*..... 92
18. ——— On a general demurrer, there being no motion to make more definite and certain, a petition should be liberally construed, and the demurrer overruled if the facts stated constitute a cause of action. *Bowersox v. Hall*..... 99
19. ——— Where money was paid to plaintiff's agent on a contract for the sale of land, a petition to recover the money on the ground of forfeiture held sufficient against demurrer. *Id.*..... 99
20. ——— Where an action to recover a convict's estate was brought in the name of a trustee, and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *New v. Smith*..... 174

DEMURRER—CONTINUED:

21. ——— A demurrer admits the truth of the facts alleged in the pleading; and while there may possibly be exceptions to this rule courts will not carefully weigh the degree of credence which a particular person may have given to what appears to be an unreasonable story told to him for the purpose of defrauding him. *Insurance Co. v. Johnson*..... 568
22. Record.—See Nos. 12, 13, 17.

DENIAL OF PLAINTIFF'S RIGHT—See "EJECTMENT," 9, 10.

DENIAL UNDER OATH—See "ANSWER."

DEPARTURE—See "DEMURRER."

DEPRECIATION OF MARKET—See "DAMAGES."

DESCENTS AND DISTRIBUTIONS:

1. **Assets of Estate.**—Where one lends money upon notes secured by mortgages on real estate, which notes and mortgages he retains in his possession, they are assets of his estate upon his death although made payable to a third person. *Harrison v. Harrison* 25
2. **Contest of a Will.**—See "WILLS," 5, 6.
3. **Estoppel of Heirs.**—Where a grantor would be estopped to deny that a deed was effectual, the grantee of his heirs by quitclaim had no standing to deny it. *Harrington v. Lowe*..... 24
4. **Limitation of Actions.**—See No. 6.
5. **Partition.**—See Nos. 7, 8.
6. **Recovery of Real Property.**—An action by heirs to recover real property descending to them but sold by an administrator upon an order of court must be begun within five years after the deed is recorded, although the sale be void for want of notice to the heirs. *O'Keefe v. Behrens*..... 469
7. ——— Heirs suing for possession and partition of real estate acquired by descent are not required to show that the land is not subject to appropriation for the payment of the decedent's debts. *Id.*..... 469
8. ——— General creditors are not proper parties to partition proceedings by heirs, and the administrator should not be joined unless under exceptional circumstances. *Id.*..... 480
9. **Rights of Heirs.**—See Nos. 6, 7.

DESCRIPTION IN A DEED—See "TAXATION."

DESCRIPTION OF MATERIAL—See "PETITION."

DILIGENCE OF CREDITOR—See "SURETYSHIP AND GUARANTY."

DIRECTION OF VERDICT—See "PRACTICE, DISTRICT COURT."

DISBARMENT—See "ATTORNEYS."

DISCHARGE—See "CRIMINAL LAW;" "NEGOTIABLE INSTRUMENTS," 9.

- DISCRETION**—See "TRUSTS AND TRUSTEES."
DISMISSAL—See "PRACTICE, DISTRICT COURT;" "PRACTICE, SUPREME COURT;" "ATTORNEYS," 34.
DISPOSSESSION OF TAX-DEED HOLDER—See "TAXATION."
DISSOLUTION—See "INJUNCTION."
DISTRIBUTIONS—See "DESCENTS AND DISTRIBUTIONS."
DISTRICT COURT—See "PRACTICE, DISTRICT COURT;" "JURISDICTION."
DIVERSION OF A TAX—See "CONSTITUTIONAL LAW."
DIVORCE AND ALIMONY—See "LIMITATION OF ACTIONS."
DRAFT—See "NEGOTIABLE INSTRUMENTS."
DUE PROCESS OF LAW—See "CONSTITUTIONAL LAW."
DUPLICITY—See "PRACTICE, DISTRICT COURT."
DUTY TO FURNISH CARS—See "CONTRACTS."

E.

- EASEMENTS**—See "DAMAGES," 22, 23.
EDUCATION—See "SCHOOLS AND SCHOOL-LAND."
EJECTMENT:

1. **Amendment of Answer.**—See "PRACTICE, DISTRICT COURT."
2. **By a Tax-deed Holder.**—Where a tax deed, valid on its face, has been recorded five years, with the holder in actual possession, and one claiming adversely dispossesses him by force, fraud, or stealth, the holder of the deed may maintain ejectment to regain what was wrongfully taken from him. *Nicholson v. Hale*... 599
3. ——— The two-year statute of limitations has no application to such a case. *Id.*..... 599
4. **Defense of Ownership.**—Redemption from a tax-deed holder and directing him to quitclaim to the legal owner did not conclusively prove that defendant was not the owner. *Hall v. Davidson*..... 88
5. ——— It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Id.*..... 88
6. **Duplex Petition.**—When a petition sets up a cause of action in ejectment and another for rents and profits, a motion separately to state and number should be allowed. *New v. Smith*..... 174
7. **Lien for Taxes.**—A part owner who sued in ejectment allowed to enforce a lien for a proportionate share of taxes paid although he had not pleaded a claim for contribution. *Young v. Bigger*..... 149
8. **Mortgagee in Possession.**—A peaceable entry into possession of unoccupied land, and continued posses-

EJECTMENT—CONTINUED:

- sion, by a mortgagee, after condition broken, is a defense to ejectment by the owner, until the mortgage lien has been satisfied. *Walters v. Chance*..... 680
9. **Partial Recovery.**—Where a petition in ejectment alleges full title, and the answer includes a general denial, coupled with a claim of a fractional interest, the plaintiff, upon proof of partial title, is entitled to a proportionate recovery and to judgment for costs. *Young v. Bigger*..... 146
10. ——— Such a case is not within the provisions requiring a tenant in common in suing a cotenant for possession to allege that defendant has denied his right. *Id.*..... 146
11. **Pleadings.**—In an action of ejectment the pleadings put in issue the ownership of the property, and it was error for the court to render judgment on the pleadings, the issue being undetermined. *McCready v. Dennis* 778
12. **Purchaser at Administrator's Sale.**—See "LIMITATION OF ACTIONS," 2.
13. **Title in Third Party.**—Paramount right in a third person is not a defense in ejectment. *Fowler v. Wood*, 551

ELECTION OF COUNTS—See "PRACTICE, DISTRICT COURT."

ELECTIONS:

1. **Preservation of Ballots.**—Where the contestee waives investigation concerning the custody and identity of ballots, and the court proceeds to count them, it is not precluded from making such investigation and rejecting ballots at any time before it finally determines who was elected. *Moorhead v. Arnold*..... 133
2. ——— The public has an interest in an election contest which rival claimants to the office cannot barter away. *Id.*..... 145
3. ——— Findings by a contest court relating to the physical appearance, conditions and contents of a sack of election ballots sustained, the bag and its contents having been inspected by each of the judges. *Id.*.... 132
4. **Recount of Ballots.**—An objection by a contestee to the counting of ballots because they have not been legally preserved is an objection to evidence only and need not be pleaded in the contestee's answer. *Id.*... 132

ELECTRIC RAILROADS—See "RAILROADS," 5-10.

EMBEZZLEMENT—See "CRIMINAL LAW."

EMERGENCY—See "DAMAGES."

EMINENT DOMAIN—See "DAMAGES," 22-30.

ENCROACHMENT—See "WATERS AND WATER COMPANIES."

EQUAL PROTECTION—See "CONSTITUTIONAL LAW."

EQUITABLE OWNER—See "TITLE AND OWNERSHIP."

ERROR—See "PRACTICE, SUPREME COURT."

ERROR FROM PROBATE COURT—See "JURISDICTION."**ESTOPPEL AND WAIVER:**

1. **Attorney.**—See No. 24.
2. **Conveyance.**—If a private owner grant land, bounding it upon a river, the presumption that it carries title as far as he owns is rebuttable, the question being one of intention; and when the intention is ascertainable from the record of a proceeding, or the face of an instrument, other evidence is inadmissible. *Fowler v. Wood*..... 513
3. **Creditor—Authority of Agent.**—Where a debtor pays a note not due to a pretended agent who does not have possession of it, so as to bind the creditor, the circumstances must be such as to estop the creditor to deny the agent's authority. *Goodyear v. Williams*... 195
4. **Election Contest.**—Where the contestee waives investigation concerning the custody and identity of ballots, and the court proceeds to count them, it is not precluded from making such investigation and rejecting ballots at any time before it finally determines who was elected. *Moorhead v. Arnold*..... 133
5. ——— The public has an interest in an election contest which rival claimants to the office cannot barter away. *Id.*..... 145
6. **Election of Counts.**—See "PRACTICE, DISTRICT COURT."
7. **Execution of Written Contract.**—One signing an instrument which he did not read is not estopped to deny fraud in the execution of the contract. *Deming v. Wallace* 294
8. **Failure to Plead.**—Where a case is tried as though a question of estoppel were in issue, the fact that it was not formally presented by the pleadings does not prevent its consideration on review. *Edwards v. Sourbeer* 224
9. **Findings of Fact.**—See "PRACTICE, SUPREME COURT," 50.
10. **Forfeiture.**—One who had a right to declare a contract for the sale of real estate forfeited held to have waived the right by his conduct. *Cue v. Johnson*.... 558
11. **General Verdict.**—If a general verdict was desired it should have been asked for before the jury were discharged. *Smyser v. Fair*..... 773
12. **Grantee.**—Where a grantor would be estopped to deny that a deed was effectual, the grantee of his heirs by quitclaim had no standing to deny it. *Harrington v. Lowe*..... 24
13. **Grantor.**—See No. 27.
14. **Homestead Claimant.**—See No. 16.
15. **Journal Entry—Correctness.**—The indorsement by an attorney of a journal entry does not estop the denial of its correctness. *Christisen v. Bartlett*..... 403
16. **Mortgagor.**—A homestead claimant who gives a mortgage is estopped from defeating the lien after —

ESTOPPEL AND WAIVER—CONTINUED:

- acquiring title from the government. *Stark v. Morgan* 453
17. Notice.—A party cannot be heard to say that a notice which he expressly waived was not given. *Smyser v. Fair* 773
18. Objection to Evidence.—See "EVIDENCE," 42.
19. Objection to Findings.—See "JURY AND JURORS," 17.
20. Partition.—See "WATERS AND WATER COMPANIES," 12.
21. Pleading.—A party cannot be allowed to assume antagonistic attitudes upon the record. *Harrington v. Lowe* 23
22. ——— An objection that the defense of the statute of frauds was not properly pleaded, raised for the first time in this court, cannot be regarded with favor. *Baldwin v. Baldwin*..... 41
23. Privilege of a Witness.—See "EVIDENCE."
24. Real Party in Interest.—One who as attorney brought unlawful detainer in another's name held estopped to deny that the nominal plaintiff was the real party in interest and entitled to settle the litigation, although defendant had notice that the attorney claimed to be himself entitled to possession. *Edwards v. Sourbeer* 224
25. Right to Speedy Trial.—See "CRIMINAL LAW."
- 25a. Ruling upon Demurrer.—Where the record does not show on which of several grounds a demurrer was sustained, judgment will be affirmed if any of the grounds set out be well founded. *Martindale v. Battey* 95
26. ——— An erroneous ruling held not void, and because not properly challenged it became final. *Id.*... 95
27. Statute of Limitations.—When land was conveyed by warranty deed, both parties knowing that a claimant occupied it, and the grantor undertook by litigation to clear the title, and represented that he would do so, and the grantee relied thereon, the grantor was estopped in an action on the warranty to plead the statute of limitations. *Railway Co. v. Pratt*..... 210
28. ——— The statute of limitations, to be available as a defense, must be affirmatively pleaded or otherwise asserted, and a failure to do so constitutes a waiver of such defense. *Croan v. Baden*..... 364
29. Test of Machinery.—Where machinery sold under a guaranteed capacity is used by the buyer, pending a test he is not obliged to bring about and the seller can delay, the test is not waived nor the seller relieved from demonstrating its capacity, if such use does not violate the contract or prejudice the seller's rights. *Ehrsam v. Jackman*..... 436
30. ——— In a contract to sell mill machinery a provision that a guaranteed capacity shall be demonstrated before payment is not collateral, and the test must be made or waived before an action for the price can be maintained. *Id.*..... 435

ESTOPPEL AND WAIVER—CONTINUED:

31. ——— A contract for the sale of machinery held to contemplate a mill-run demonstration of the guaranteed capacity as a condition precedent to the payment of the purchase-price. *Id.*..... 435
32. Use of Machinery Pending Test.—See No. 29.

EVICITION—See “CONVEYANCES,” 5.

EVIDENCE:

1. Accounts.—See Nos. 4-6, 117.
2. Acknowledgment of a Debt.—See No. 121.
3. Admissions.—See No. 129; see, also, “ANSWER.”
4. Agency.—Where a note was payable at a bank, and was not due, and was paid to one not connected with the bank, who did not have possession of the note, and the agency was controverted, statements of the alleged agent when the papers were executed, unknown to the mortgagee, that the interest might be paid to him, were inadmissible. *Goodyear v. Williams*, 192
5. ——— So of letters written by the plaintiff to the alleged agent relating to specific claims against other persons and of which defendant had no knowledge at the time of payment. *Id.*..... 192
6. ——— So of entries in a loan register, not a book of accounts, kept by the alleged agent, unknown to plaintiff or defendant at the time of payment. *Id.*... 192
7. ——— Where a debtor pays a note not due to a third person who does not have possession of it there is a *prima facie* presumption that the person receiving the money does so as the agent for the debtor. *Id.* 192
8. Amount of a Check.—See No. 82.
9. Bond for a Deed.—In an action of forcible entry and detainer, where defendant claimed he entered peaceably, with plaintiffs’ verbal permission, a bond for a deed executed by plaintiffs was admissible to show the character of defendant’s entry and possession. *West v. Comeaux*..... 271
10. Bribery.—See “CRIMINAL LAW,” 6, 7.
11. Burden of Proof (See, also, Nos. 7, 33, 34).—Whether the answer “do not know” to a special question is equivalent to “yes,” or “no,” depends upon the form of the question. Generally such an answer shows that the party whose duty it was to establish the fact involved in the question has failed in his proof. *Croan v. Baden*..... 364
12. ——— The presumption of good character does not stand until overcome beyond a reasonable doubt; it may be overthrown by evidence less conclusive. *The State v. Roupetz*..... 665
13. ——— Where machinery sold under a guaranteed capacity is used by the buyer, pending a test he is not obliged to bring about and the seller can delay, the test is not waived nor the seller relieved from demon-

EVIDENCE—CONTINUED:

- strating its capacity, if such use does not violate the contract or prejudice the seller's rights. *Ehrsam v. Jackman* 436
14. ——— Where there are no witnesses to a death which occurs to a passenger, and circumstances are sufficient to justify the conclusion that the cause of the death was wrongful, the jury may infer ordinary care on the part of the injured person from the instinct of self-preservation. *Railroad Co. v. Brown*... 235
15. ——— An instruction as to the burden of proving contributory negligence was proper when considered with other instructions given. *Railway Co. v. Brickell* 278
16. **Calling of Witnesses.**—In a criminal action the state is not obliged to place upon the stand every witness whose name is indorsed upon the indictment. *The State v. Campbell*..... 690
17. ——— Defendant has no right to rely upon the attendance of a witness merely because the state may have caused a subpoena to issue for such witness. *Id.* 690
18. **Change of Venue.**—See "PRACTICE, DISTRICT COURT."
19. **Circumstantial.**—Before a jury is justified in convicting upon circumstantial evidence alone the circumstances proved must not only all be consistent with the theory of the defendant's guilt, but they must be so strong as to exclude any other reasonable hypothesis. *The State v. Sweizewski*..... 733
20. **Comment by the Court.**—See "PRACTICE, DISTRICT COURT."
21. **Conclusions from Statements.**—See Nos. 80, 81.
22. **Confessions.**—See No. 127.
23. **Consideration.**—Between the original parties to a bill or note the consideration may always be inquired into. *Deming v. Wallace*..... 291
24. **Contract—Parent and Child.**—An express contract between a parent and child for the payment of services may be proved by any competent testimony. *Griffith v. Robertson*..... 666
25. ——— A party prosecuting a claim against the estate of a deceased person is competent to testify to conversations had between the deceased and a third person in the presence and hearing of the witness. *Id.* 666
26. **Correction of Record.**—See "PRACTICE, DISTRICT COURT."
27. **Corroborative.**—See No. 71.
28. **Credibility of Witness.**—See No. 29.
29. **Cross-examination.**—Cross-examination of defendant in reference to peace proceedings was admissible to affect his credibility. *The State v. Roupetz*..... 665
30. **Defective Counts.**—See "CRIMINAL LAW," 48.
31. **Demurrer.**—See "DEMURRER."

EVIDENCE—CONTINUED:

32. **Depositions.**—Depositions against the accused in a disbarment proceeding are admissible. *In re Burnette* 614
33. **Disbarment.**—Where the charges made against an attorney involve moral turpitude, proof of a conviction is not essential to a disbarment. *In re Smith*... 744
34. ——— Testimony of moral and professional delinquency held to meet the requirement that more than a preponderance of the evidence is necessary, and to be sufficient to support the judgment of disbarment. *Id.* 744
35. ——— Evidence held insufficient to warrant the disbarment of an attorney. *In re Elliott*..... 151
36. ——— The failure of the accused in a disbarment proceeding to give testimony either in denial or explanation of incriminating facts may be considered by the court in weighing the evidence of his guilt. *In re Burnette* 611
37. **Effect of Explosions of Dynamite.**—See No. 79.
38. **Election Ballots.**—See "ELECTIONS."
39. **Expert.**—See Nos. 78-81, 117.
40. **Expressions of Pain.**—Testimony by physicians and others of expressions of pain by plaintiff held admissible. *Railway Co. v. Wade*..... 360
41. **Failure of Proof.**—See "CRIMINAL LAW."
42. **Failure to Limit.**—Where evidence competent as to only one codefendant is admitted over the objection of other codefendants, the court's failure to limit its application is not error where the objecting defendants do not request such limitation. *Sweet v. Savings Bank* 47
43. **Failure to Testify.**—See No. 36.
44. **Forcible Detainer.**—See Nos. 9, 109.
45. **Forfeiture of Right of Way.**—See "RAILROADS."
46. **Fraud.**—In a suit to avoid a written contract on the ground of fraud parol evidence is admissible. *Insurance Co. v. Johnson*..... 567
47. ——— Rulings upon evidence offered in an action on a lost note of a deceased maker, where there was a defense of fraud, discussed. *Haines v. Goodlander*.... 187
48. ——— Parol testimony is competent for the purpose of proving fraud and misrepresentation in procuring the execution of a promissory note, where fraud is pleaded as a defense. *Deming v. Wallace*..... 291
49. ——— One signing an instrument which he did not read is not estopped to deny fraud in the execution of the contract. *Id.*..... 294
50. ——— In an action on a lost note of a deceased maker, proof that plaintiff was financially embarrassed at the time the note was claimed to have been given was properly received. *Haines v. Goodlander*.. 183
51. ——— To prove her financial ability to make a loan, plaintiff offered to show that she had proposed to pay

EVIDENCE—CONTINUED:

- a large indebtedness but that payment was declined. This was a self-serving declaration and inadmissible. *Id.* 184
52. ——— In a proceeding to foreclose a tax lien the district court shall investigate what taxes have been legally assessed, and an increment to taxes occasioned by a fraudulent valuation should be eliminated. *Whitney v. Morton County*..... 502
53. General Denial.—See "ANSWER."
54. Grand Jurors.—The statute prohibiting grand jurors from disclosing evidence given before them or the name of any witness, except when lawfully required to testify, is not limited by the statute which permits such evidence in certain cases. *The State v. Campbell* 689
55. ——— Grand jurors may testify to what passed before them when, after the purpose of secrecy imposed by the common law and the statutes has been effected, such disclosure is necessary to further justice or protect public or individual rights. *Id.*..... 689
56. Hearsay.—See Nos. 25, 40, 80, 81, 117.
57. Immunity of a Witness.—See No. 130.
58. Intent in Receiving Money.—See "CRIMINAL LAW," 6.
59. Intention—Conveyance.—If a private owner grant land, bounding it upon a river, the presumption that it carries title as far as he owns is rebuttable, the question being one of intention; and when the intention is ascertainable from the record of a proceeding, or the face of an instrument, other evidence is inadmissible. *Fowler v. Wood*..... 513
60. Journal Entry.—Parol evidence is sufficient to prove that a record of a judgment is erroneous. *Martindale v. Battey*..... 92
61. Judgment Debtor.—See No. 104.
62. Judicial Notice.—The courts will take judicial notice of the meaning of the words "f. o. b. cars." *Hurst v. Manufacturing Co.*..... 426
63. ——— This court has no judicial knowledge of how much flour may be extracted from different grades of wheat. *Ehrsam v. Jackman*..... 446
64. ——— The courts will take notice without proof that a municipality is a city of the second class, where it has been made such under the statute by a public proclamation issued by the governor. *The State v. Ricksecker* 496
65. ——— Judicial notice taken that Kansas City is now the only city in Kansas having over 50,000 inhabitants. *Parker-Washington Co. v. Kansas City*..... 726
66. Malicious Prosecution.—The failure of a party to secure release upon his own recognizance did not prove conclusively that he attached small importance to his arrest or deprive him of the right to damages on the ground that he did not consider himself injured. *Reynolds v. Dunlap*..... 759

EVIDENCE—CONTINUED:

67. **Market Value.**—See Nos. 77, 78.
68. **Misrepresentations.**—See No. 48.
69. **Motion to Strike Out.**—See No. 111.
70. **Negligence.**—See Nos. 14, 15, 106.
71. **Newly Discovered.**—A letter corroborating what defendant had previously sworn to could not have been material to disprove the charge of bribery. *The State v. Campbell* 719
72. **Objection to Evidence** (See, also, No. 42).—It is not necessary to file a motion for a new trial before bringing to this court for review a decision granting a motion for judgment upon the pleadings and the opening statement of counsel and sustaining an objection to the introduction of evidence. *Wagner v. Railway Co.*, 283
73. ——— An objection by a contestee to the counting of ballots because they have not been legally preserved is an objection to evidence only and need not be pleaded in the contestee's answer. *Moorhead v. Arnold* 132
74. ——— When an objection to the introduction of evidence under the pleadings is sustained there can be no investigation, much less determination, of the issues of fact, and a motion for a new trial is not necessary. *Wagner v. Railway Co.*..... 285
75. ——— A petition to recover an amount agreed upon after the dissolution of a partnership held sufficient. *Burley v. Brown*..... 780
76. **Offer of Proof.**—See "PRACTICE, DISTRICT COURT."
77. **Opinion.**—Where witnesses who were not qualified to testify to market value were permitted to do so the court properly withdrew their testimony from the jury. *Dethample v. Irrigation Co.*..... 56
78. ——— The opinion of a qualified witness as to the value of the land was properly admitted. *Id.*..... 56
79. ——— The opinion of a witness, duly qualified, as to the effect upon persons and buildings of the explosion of dynamite within certain distances is proper to be considered in a suit for an injunction. *Remsberg v. Cement Co.*..... 66
80. ——— A physician may not give his conclusions as to the permanency of an injury based partially on the history of the injury detailed to him by the patient or others and partially on his own examination. *Betterment Co. v. Reeves*..... 107
81. ——— A physician may testify to the condition of the patient as he found him, whether suffering from pain, and to utterances or exclamations of pain, and he may also give the patient's statement as to the location of the pain causing such exclamations. *Id.*... 118
82. ——— A witness who admits that he does not know the amount of certain checks should not be allowed to give his estimate, as a judicial finding cannot be based upon mere conjecture. *Haines v. Goodlander*, 183

EVIDENCE—CONTINUED:

83. **Oral Agreement.**—Before specific performance of a parol agreement to convey lands will be enforced the facts relied upon must be established by clear and satisfactory proof. *Baldwin v. Baldwin*..... 46
84. **Ownership.**—Redemption from a tax-deed holder and directing him to quitclaim to the legal owner did not conclusively prove that defendant was not the owner. *Hall v. Davidson*..... 88
85. **Parol.**—See Nos. 23-25, 46, 48, 59, 60.
86. **Peaceable Entry.**—See No. 9.
87. **Perjury.**—A mortgage given before final proof does not stand in the way of the claimant's honest oath upon final proof. *Stark v. Morgan*..... 463
88. **Physician.**—See Nos. 40, 80, 81.
89. **Plaintiff's Financial Condition.**—See Nos. 50, 51.
90. **Pleading.**—See "PETITION," 6-8.
91. **Presumption as to Agency.**—See No. 7.
92. **Presumption as to Tax Deed.**—Where a tax deed has been recorded more than five years before it is attacked, all presumptions are in favor of the regularity of the prior tax proceedings. *Gibson v. Trisler*, 397
93. **Presumption as to Title Conveyed.**—See No. 59.
94. **Presumption Based upon Another.**—See No. 106.
95. **Presumption of Good Character.**—See No. 12.
96. **Presumption of Notice.**—Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. *Railway Co. v. Implement Co.*..... 295
97. ——— A carrier deemed to have had notice that machines consigned were for immediate sale, and that a delay in delivery until after the thrashing season would defeat the purpose of the shipment. *Id.*..... 295
98. ——— The character of the shipment required the carrier to transport the cattle with reasonable dispatch. *Railway Co. v. Poole*..... 469
99. **Presumption of Ownership.**—The consignee is always presumed to have the necessary ownership to sue in conversion until the contrary is shown. *Railway Co. v. Implement Co.*..... 299
100. **Privileged Communication.**—A publication by a client of a privileged communication released the attorney from the confidential relation he bore to it. *In re Burnette*..... 610
101. ——— Requisites of a privileged communication from a client to his attorney prescribed. *In re Elliott*..... 151
102. ——— An answer prepared by an attorney, having been published by the client, was not a confidential communication. *Id.*..... 151
103. **Privilege of a Witness.**—See Nos. 127, 128, 130.
104. **Proceeding in Aid of Execution.**—Absence of a judgment debtor in a proceeding in aid of execution

EVIDENCE—CONTINUED:

- does not preclude the examination of other witnesses nor prevent the judge from making a proper order. *Honce v. Schram*..... 369
105. ——— One testifying under a subpoena in a proceeding in aid of execution, who is not made a party and does not intervene to claim the property, is not bound by the order and may afterward litigate his rights. *Id.* 368
106. **Rebuttal of Contributory Negligence.**—In a personal-injury case, where the inference of contributory negligence seemed justifiable, plaintiff's evidence in rebuttal was not subject to the objection that it based one presumption upon another. *Railway Co. v. Brickell* 274
107. **Receipt of Money.**—See "CRIMINAL LAW," 7.
108. **Review.**—See "PRACTICE, SUPREME COURT."
109. **Right to Possession.**—Evidence of title, legal or equitable, may be received in an action of forcible detainer when necessary to determine the right to possession. *Dineen v. Olson*..... 379
110. **Secondary.**—See No. 59.
111. **Seduction.**—Evidence that after a contract to marry had been made the man seduced the woman may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out. *Sramek v. Sklenar*..... 450
112. **Self-serving Declarations.**—See No. 51.
113. **Special Findings.**—See "JURY AND JURORS."
114. **Statements before a Grand Jury.**—See Nos. 127, 128.
115. **State's Evidence.**—In a prosecution for incest it is not a good plea in bar or a ground for quashing the information that the action against the woman has been dismissed for the purpose of making her a witness for the state. *The State v. Learned*..... 328
116. **Sufficiency.**—See "PRACTICE, SUPREME COURT," 41, 42, 44-46.
117. **Summary of Accounts.**—Where accounts are voluminous or complicated the testimony of a competent witness who has made an examination and summary of them may ordinarily be received if the original would be competent. *Haines v. Goodlander*..... 184
118. **Threats of Deceased.**—Threats of deceased against defendant's brother, not involving defendant, properly excluded. *The State v. Roupetz*..... 663
119. ——— Statements by deceased that defendant would have to walk over his dead body before defendant should have any of his mother's property was not a threat, and under the circumstances its exclusion was not error. *Id.*..... 665
120. **Title as Trustee.**—The fact that a draft charged to have been fraudulently obtained was made payable to defendant "for the use of" the person alleged to have

EVIDENCE—CONTINUED:

- been defrauded did not conclusively show that the defendant acquired title to it only as a trustee. *The State v. Wilson*..... 335
121. **Tolling the Statute.**—Letters attached to a petition in a foreclosure suit, alleged to have been written by one of the makers of the note to the payee, held to be a *prima facie* acknowledgment of the debt so as to toll the statute of limitations. *Disney v. Healey*..... 326
122. **Transactions—Deceased and Third Persons.**—See No. 25.
123. **Variance.**—In a prosecution for obtaining money by false pretenses, where property sold as clear was mortgaged, proof of a mortgage given for \$13,366.80, the amount stated in the information being \$13,336.80, was not a fatal variance. *The State v. Wilson*..... 335
124. ——— In such a prosecution the allegation of the information that the mortgage had been by the mortgagee assigned to, and was owned by, a bank and one Hax was sustained by the proof. *Id.*..... 335
125. ——— In such a prosecution the proof of a mortgage given for \$13,366.80, the amount stated in the information being \$13,336.80, is not a fatal variance. *Id.*..... 335
126. ——— In such a prosecution the allegation of the information that the mortgage had been by the mortgagee assigned to, and was owned by, a bank and one Hax was sustained by the proof. *Id.*..... 335
127. **Voluntary or Involuntary.**—Statements by a defendant in a criminal action in denial of guilt before a grand jury are not confessions within the rule requiring them to have been made voluntarily before they are competent evidence against him. *The State v. Campbell*..... 688
128. ——— Testimony before the grand jury in obedience to a subpoena is not involuntary. He may refuse to give answers which tend to incriminate him, and by the failure to exercise his privilege his statements become voluntary. *Id.*..... 688
129. ——— Voluntary statements made by a defendant, which do not tend to establish his guilt but are exculpatory, are competent evidence against him as admissions of a party. *Id.*..... 689
130. ——— One in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county. *Underwood v. Fosha*..... 408
131. **Withdrawal.**—See “PRACTICE, DISTRICT COURT.”

EXCESSIVE VERDICT—See “DAMAGES.”

EXECUTION OF A WRITTEN INSTRUMENT—See “ANSWER,” 23, 24; “ESTOPPEL AND WAIVER,” 7; “WILLS,” 5, 6.

EXECUTION (PROCEEDING IN AID OF)—See “JUDGMENTS.”

EXECUTIONS—See "JUDICIAL SALES," 10, 12.

EXECUTORS AND ADMINISTRATORS:

1. **Administrator's Sale.**—See "JUDICIAL SALES."
2. **Assets of Estate.**—Where one lends money upon notes secured by mortgages on real estate, which notes and mortgages he retains in his possession, they are assets of his estate upon his death although made payable to a third person. *Hanrion v. Hanrion*. 25
3. **Child's Claim for Services.**—See "CONTRACTS," 64-67.
4. **Conducting Decedent's Business.**—In the absence of a testamentary direction an administrator of the estate cannot carry on the business of the decedent, and if he does so without authority he will be personally bound for the contracts of the business. *Campbell v. Faxon* 675
5. **Lost Note—Deceased Maker.**—See "NEGOTIABLE INSTRUMENTS."
6. **Parties.**—General creditors are not proper parties to partition proceedings by heirs, and the administrator should not be joined unless under exceptional circumstances. *O'Keefe v. Behrens*. 480
7. **Personal Contracts of Testator.**—A contract held to have created a personal relation which was dissolved by the death of one of the parties, and did not bind the administrator of the estate. *Campbell v. Faxon* 675
8. **Personal Liability.**—See No. 4.
9. **Testamentary Trust.**—See "WILLS."

EXECUTORY CONTRACT—See "CONTRACTS."

EXEMPLARY DAMAGES—See "DAMAGES," 108.

EXEMPTION FROM PROCESS—See "EVIDENCE," 130.

EXEMPTIONS—See "HOMESTEADS AND EXEMPTIONS."

EXPENSES—See "DAMAGES."

EXPERT TESTIMONY—See "EVIDENCE."

EXPRESSIONS OF PAIN—See "EVIDENCE."

F.

FACE TO FACE (WITNESS)—See "CONSTITUTIONAL LAW."

FAILURE OF CONSIDERATION—See "MORTGAGES;" "CONTRACTS," 10.

FAILURE TO LIMIT EVIDENCE—See "EVIDENCE."

FAILURE TO PLEAD ESTOPPEL—See "PRACTICE, SUPREME COURT."

FAILURE TO SUMMON—See "JURY AND JURORS."

FAILURE TO TESTIFY—See "EVIDENCE."

FAMILY RELATION—See "CONTRACTS," 64-67; "DAMAGES," 73, 75, 87-89, 105; "PARTIES," 15; "HUSBAND AND WIFE."

FEES AND SALARIES—See "AGENCY," 8-15; "ATTORNEYS," 33, 34; "MONOPOLIES," 2-4; "OFFICE AND OFFICERS," 26.

FILING OF TRANSCRIPT—See "PRACTICE, SUPREME COURT."

FILING SEPARATE PETITIONS—See "PRACTICE, DISTRICT COURT."

FINAL DETERMINATION—See "PETITION," 30, 31; "DEMURRER," 15-17.

FINAL PROOF—See "HOMESTEADS AND EXEMPTIONS."

FINDINGS OF FACT—See "PRACTICE, SUPREME COURT;" "JURY AND JURORS," 16-24.

FIRE-INSURANCE—See "INSURANCE."

"F. O. B. CARS"—See "CONTRACTS."

FORCIBLE ENTRY AND DETAINER:

1. **Action in Name of Another.**—See No. 7.
2. **Evidence of Peaceable Entry.**—In an action of forcible entry and detainer, where defendant claimed he entered peaceably, with plaintiffs' verbal permission, a bond for a deed executed by plaintiffs was admissible to show the character of defendant's entry and possession. *West v. Comeaux*..... 271
3. **Evidence of Title.**—Evidence of title, legal or equitable, may be received in an action of forcible detainer when necessary to determine the right to possession. *Dineen v. Olson*..... 379
4. **Findings and Verdict.**—In an action of forcible entry and detainer the special findings did not authorize a judgment in favor of the plaintiff. *West v. Comeaux*, 272
5. **Jurisdiction.**—It was held that a justice of the peace had jurisdiction in an action of forcible detainer against one who had entered into the possession of land under a contract which had become forfeited. *Dineen v. Olson*..... 379
6. ——— If the defendant had any equitable rights they could be adjusted in a subsequent proceeding. *Id.*.... 387
7. **Real Party in Interest.**—One who as attorney brought unlawful detainer in another's name held estopped to deny that the nominal plaintiff was the real party in interest and entitled to settle the litigation, although defendant had notice that the attorney claimed to be himself entitled to possession. *Edwards v. Sourbeer*..... 224

FORECLOSURE—See "MORTGAGES;" "TAXATION," 8-11.

FOREIGN CORPORATIONS—See "CORPORATIONS."

FOREIGN LAW—See "LIMITATION OF ACTIONS," 4.

FORFEITURE—See "SCHOOLS AND SCHOOL-LAND;" "CONTRACTS;" "RAILROADS;" "CRIMINAL LAW;" "OFFICE AND OFFICERS," 25.

FORMER DECISION—LAW OF THE CASE—See "PRACTICE, SUPREME COURT."

FORMER JEOPARDY—See "CRIMINAL LAW."

FORNICATION—See "CRIMINAL LAW."

"FOR THE USE OF"—See "WORDS AND PHRASES."

FRATERNAL INSURANCE—See "INSURANCE."

FRAUD:

1. **Dismissal of Suit.**—See "ATTORNEYS," 34.
2. **Dispossession of Tax-deed Holder.**—See "TAXATION."
3. **Evidence.**—See "EVIDENCE."
4. **Obtaining Money by False Pretenses.**—See "CRIMINAL LAW."
5. **Oral Agreement.**—In a suit to enforce a parol agreement to convey land, where possession is relied upon as part performance, the character of the possession is of the greatest importance. It must be notorious, exclusive, continuous, and in pursuance of the contract. *Baldwin v. Baldwin*..... 39
6. ——— An instruction that plaintiff is entitled to recover if he has proved that he was placed in possession of the land under the contract held insufficient under the conceded facts. *Id.*..... 39
7. ——— Before specific performance of a parol agreement to convey lands will be enforced the facts relied upon must be established by clear and satisfactory proof. *Id.*..... 46
8. ——— An objection that the defense of the statute of frauds was not properly pleaded, raised for the first time in this court, cannot be regarded with favor. *Id.*..... 41
9. ——— A contract for the employment of a real-estate agent need not be in writing. *Long v. Thompson* 79
10. **Paving Contracts.**—See "CITIES AND CITY OFFICERS," 9, 10, 12.
11. **Pleading.**—See No. 8.
12. **Possession—Part Performance.**—See Nos. 5-7.
13. **Question of Fact.**—In a suit to avoid a contract on the ground of fraudulent representations a defense that the representations were so palpably false that the plaintiff could not have been injured thereby raises a question of fact. *Insurance Co. v. Johnson*.. 567
14. **Representations by Covenantor.**—See "CONVEYANCES," 3.
15. **Sale of Bank Stock.**—In an action for fraud in a sale of bank stock, where the court erred in including items in its computation of the value of the stock, the amount allowed in excess of the actual value was not permitted to stand as punitive damages. *Borders v. Carroll* 766
16. **Tax Valuation.**—In a proceeding to foreclose a tax lien the district court shall investigate what taxes have been legally assessed, and an increment to taxes occasioned by a fraudulent valuation should be eliminated. *Whitney v. Morton County*..... 502

FUNDS (GENERAL)—See "TAXATION."

FUNDS (MISAPPROPRIATION)—See "DAMAGES."

G.

GENERAL DENIAL—See "ANSWER."

GENERAL FUND—See "TAXATION."

GENERAL LAW—See "CONSTITUTIONAL LAW."

GENERAL VERDICT—See "JURY AND JURORS."

GRAMMAR—See "STATUTORY CONSTRUCTION," 3.

GRAND JURY—See "JURY AND JURORS."

GRANTOR AND GRANTEE—See "CONVEYANCES."

GUARANTY—See "SURETYSHIP AND GUARANTY."

GUARDIAN AND WARD:

1. Application to Sell Real Estate.—A guardian's deed will not be held void upon a collateral attack merely because the petition for leave to sell real estate does not affirmatively show the existence of the conditions which authorize such sale. *Beachy v. Shomber* 62
2. ——— An ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will if possible be given a construction that will uphold the deed. *Id.*..... 62
3. ——— The notice required to be given to a ward of the hearing of his guardian's application for leave to sell real estate is jurisdictional, and a deed made without notice is void, and subject to collateral attack. *Id.*..... 62
4. ——— When the record shows the giving of a notice to a ward of his guardian's application for leave to sell his real estate, and such notice is unavailing, it cannot be presumed from the fact that the sale was confirmed that any other notice was given. *Id.*..... 62
5. Appointment.—Except as limited by statute, probate courts have the same power over the person and estate of lunatics that was formerly possessed by courts of chancery under the common law. *Foran v. Healy* 640
6. ——— In the absence of a statute no notice is necessary to confer authority upon a probate court to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind. *Id.*..... 640
7. ——— An adjudication under section 3941, legally had, is conclusive upon all persons; and the probate court of the lunatic's permanent residence may act thereon the same as if such adjudication had occurred in that court. *Id.*..... 633
8. ——— The authority given probate courts (Gen. Stat. 1901, § 3941) to inquire into the sanity of persons in their county is a police regulation, and jurisdiction ends with the adjudication and commitment or discharge of such person. *Id.*..... 633

GUARDIAN AND WARD—CONTINUED:

9. ——— Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence. *Id.*..... 633
10. **Guardian's Deed.**—See Nos. 1-4.
11. **Notice.**—See Nos. 1, 3, 4, 6, 13.
12. **Parent and Child.**—See "CONTRACTS;" "DAMAGES," 73, 89; "SCHOOLS AND SCHOOL-LAND," 1.
13. **Service upon a Guardian.**—Service upon a guardian held to confer jurisdiction upon a district court to adjudicate the rights of a lunatic in a foreclosure proceeding. *Foran v. Healy*..... 633

H.

HACK LINES—See "DAMAGES," 103-105.

HEARSAY—See "EVIDENCE."

HEIRS—See "DESCENTS AND DISTRIBUTIONS;" "WILLS."

HIGHWAYS:

1. **Alteration.**—A defective statement of the change prayed for will not render void a petition for the alteration of a public road, where the purpose of the petition can be gathered from the language used. *Wisner v. Barber County*..... 324
2. **Defective.**—A judgment awarding damages to parents for the death of a child caused by a defective highway affirmed. *Morrill Township v. Fletchall*.... 787
3. ——— The plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action. *Id.*.... 787
4. **Subway Crossing.**—See "RAILROADS," 59, 60.

HOMESTEADS AND EXEMPTIONS:

1. **"Alienation."**—A mortgage in this state, being merely security for a debt, conveys no title and is not an "alienation" within the meaning of the statutes of the United States. *Stark v. Morgan*..... 453
2. ——— A mortgage made by a homestead claimant prior to final proof, for any purpose not intended to transfer title in evasion of the statute, is not void nor contrary to law. *Id.*..... 453
3. ——— Such a mortgagor, after acquiring title from the government, will be estopped from defeating the enforcement of the mortgage lien. His after-acquired title inures to the benefit of the mortgagee. *Id.*.... 453
4. **Final Proof.**—A mortgage given before final proof does not stand in the way of the claimant's honest oath upon final proof. *Id.*..... 463
5. **Food for Stock.**—The statute exempting to the head of a family necessary food for exempt stock does not entitle him to claim, in the absence of food for stock, wheat to be sold to purchase such food. *Voss v. Goss*, 120
6. **Mortgage.**—See Nos. 1-3.
7. **Refusal of Wife to Convey.**—See "AGENCY," 10, 11.

HUSBAND AND WIFE:

1. **Alienation of Homestead.**—See "HOMESTEADS AND EXEMPTIONS," 1-3.
2. **Consent to a Will.**—See "WILLS."
3. **Exemptions.**—See "HOMESTEADS AND EXEMPTIONS," 5.
4. **Injury to Wife.**—Where a wife was injured in her means of support by an act committed by her intoxicated husband, the person who furnished the liquor held liable to her in damages. *Zibold v. Reneer*..... 312
5. ——— The statute authorizes a recovery for both proximate and remote injuries. *Id.*..... 312
6. ——— An allegation in her petition that her husband had been convicted of murder in the first degree was not conclusive that he was not intoxicated when he committed the homicide. *Id.*..... 312
7. ——— Persons engaged in a business prohibited by law, which enriches them and makes paupers and criminals of others, have no complaint against a liberal construction of a statute to make them responsible in damages to those injured as a result of the illegal traffic. *Id.*..... 318
8. **Intoxicating Liquors.**—See Nos. 4-6.
9. **Marriage Contract.**—In an action for breach of promise to marry, it was not error to deny a motion to strike out evidential facts pleaded in aggravation of damages. *Sramek v. Sklenar*..... 450
10. ——— Even if such facts are redundant and surplusage, and could be proved without being pleaded, it is within the discretion of the court to strike out or retain them. *Id.*..... 450
11. ——— Evidence that after a contract to marry had been made the man seduced the woman may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out. *Id.*..... 450
12. ——— A promise to marry in consideration of consent to sexual intercourse is unenforceable. *Id.*..... 452
13. **Married Woman's Contract.**—In Kansas coverture affords no ground for declaring invalid a married woman's contract, even although she possesses no separate estate or separate trade or business. *Harrington v. Lowe*..... 1
14. **Refusal of Wife to Convey.**—See "AGENCY," 10, 11.
15. **Testamentary Trust.**—See "WILLS."

I.

IDENTITY OF BALLOTS—See "ELECTIONS."

ILLEGAL AGREEMENT—See "CONTRACTS."

ILLEGAL INCREMENT TO TAXES—See "TAXATION," 11.

IMMUNITY FROM PROCESS—See "EVIDENCE."

IMPLICATION (REPEAL BY)—See "STATUTORY CONSTRUCTION."

IMPLIED CONDITION—See "CONTRACTS."

IMPROVEMENTS (PUBLIC)—See "CITIES AND CITY OFFICERS."

INCEST—See "CRIMINAL LAW."

INDICTMENT—See "CRIMINAL LAW."

INDORSEMENT (RESTRICTIVE)—See "NEGOTIABLE INSTRUMENTS."

INFORMATION—See "CRIMINAL LAW."

INHERITANCE—See "DESCENTS AND DISTRIBUTIONS."

INJUNCTION:

1. **Appropriation of Land.**—Making a survey for a switch, which if built would injure plaintiff, did not authorize a temporary injunction, as it did not appear that defendant intended to appropriate the ground illegally. *Hurd v. Railway Co.*..... 83
2. ——— Defendant had a right to enter plaintiff's ground with a view of selecting the most advantageous route. *Id.*..... 86
3. ——— Mere apprehension or a possibility of wrong and injury is ordinarily not enough to warrant an injunction, but there should be at least a probability of wrongful action and irreparable injury. *Id.*..... 84
4. **Commencement of Suit.**—Where the judge and clerk of the district court is each authorized to do a certain act, and the authority for each act is dependent upon the previous action of the other, either may act first. If the acts follow one another within a reasonable time they will be regarded as done at the same time. *Barnett v. Schad.*..... 414
5. **Constitutional Law.**—See No. 14.
6. **County Commissioners.**—See "OFFICE AND OFFICERS," 8, 9.
7. **Determination of the Merits.**—To determine whether plaintiff was entitled to a preliminary injunction matters were necessarily considered which would be involved in a final consideration of the case. *Hurd v. Railway Co.*..... 88
8. **Dissolution.**—A district judge at chambers has power to dissolve a restraining order granted by a probate judge. *Id.*..... 83
9. **Jurisdiction.**—A suit to enjoin the closing of an undergrade crossing of a railroad operates *in personam*, and is not one of those required to be brought in the county in which the subject of the action is situated. *Railway Co. v. Wynkoop.*..... 590
10. ——— This is not an action to recover real property, nor for the determination of an interest therein. *Id.*, 592
11. **Nuisance.**—Whether the storing of dynamite is a nuisance by reason of inappropriate location held to be a question of fact. *Remsberg v. Cement Co.*..... 66
12. ——— Facts tending to show that such business was being located in unnecessarily close proximity to a —

INJUNCTION—CONTINUED:

- public highway frequently traveled by plaintiffs, and to the buildings of plaintiffs, are proper allegations in a suit to enjoin such business as a nuisance. *Id.*... 66
13. ——— The opinion of a witness, duly qualified, as to the effect upon persons and buildings of the explosion of dynamite within certain distances is proper to be considered in a suit for an injunction. *Id.*..... 66
14. ——— A statute held not multifarious because it deals with injunctions in respect to such diverse matters as taxation, improvident public contracts, and nuisances. *The State v. Tibbits*..... 493
15. Parties.—In a suit to enjoin a sheriff from selling real estate under an execution issued on a money judgment the judgment creditor is a proper but not a necessary party. *Barnett v. Schad.*..... 414
16. Petition.—See No. 12.
17. Possibility of Injury.—See Nos. 1-3.
18. Public Improvements.—When a petition for public improvements purports to have the requisite number of signers, and a landowner files a written protest, and the mayor and council consider the petition and protest and order the improvements made, their action is a conclusive determination of the sufficiency of the petition. *Railroad Co. v. Kansas City*..... 571
19. ——— Such landowner cannot question the validity of the proceedings in a suit to enjoin the assessments unless such suit is brought within thirty days from the time the amount of the assessment is ascertained. *Id.* 571
20. Review.—An order vacating a temporary injunction is reviewable. *The State v. Tibbits*..... 495
21. Storing of Dynamite.—See Nos. 11-13.
22. Temporary.—See No. 20.
23. Time for Allowing Order.—See No. 4.
24. Time for Issuing Summons.—See No. 4.
25. Use of Party Wall.—When there is a dispute whether a building stands wholly upon land of its owner, who is in peaceable possession, he may maintain injunction to prevent the adjoining proprietor from using a wall as a party wall until the latter has established his right thereto in proceedings brought for that purpose. *Mathis v. Strunk*..... 595

INJURIES (PERSONAL)—See "DAMAGES."

INJURY BY FIRE—See "RAILROADS."

INJURY BY TRESPASSING CATTLE—See "DAMAGES."

INJURY (POSSIBILITY OF)—See "INJUNCTION."

INJURY TO STOCK IN TRANSIT—See "RAILROADS."

INJURY TO WIFE—See "DAMAGES."

IN PARI DELICTO—See "CONTRACTS," 42, 43.

INSANE PERSONS—See "GUARDIAN AND WARD."

INSTRUCTIONS—See "PRACTICE, DISTRICT COURT."

INSURANCE:

1. **Application for Membership.**—See Nos. 10, 11.
2. **Beneficiary Certificates.**—See Nos. 10, 11.
3. **Change in Interest.**—See Nos. 6-8.
4. **Constitutional Provision.**—See Nos. 10, 11.
5. **Contract to Convey Property.**—See Nos. 7, 8.
6. **Fire.**—The word "interest" in a clause forfeiting an insurance policy for any change in "interest, title or possession" applies only where the insured owns and insures an interest less than title. *Garner v. Insurance Co.*..... 127
7. ——— Where the insured owns the title to the property insured, and makes an executory contract to convey it, no change has taken place in interest, title or possession within the meaning of such forfeiture clause. *Id.*..... 128
8. ——— A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees. *Id.*..... 131
9. **Forfeiture Clause.**—See Nos. 6-8.
10. **Fraternal.**—The constitutional provisions of a fraternal insurance association relating to beneficiary certificates constitute a part of the contract between such association and its members. *Benefit Association v. Wood.*..... 124
11. ——— A monthly assessment paid with the application for membership in an insurance order could not be applied until the constitutional provisions for acceptance had been complied with, and the certificate had not lapsed. *Id.*..... 124
12. ——— A proceeding in error to reverse a judgment against a fraternal benefit association must be commenced within sixty days after the rendition of the judgment. *Daughters of Justice v. Swift.*..... 255
13. ——— If no appeal be taken, and the judgment be not paid, an action of ouster will lie against the association. *Id.*..... 257
14. ——— The limitation of the time within which fraternal beneficiary associations may appeal from a judgment to sixty days after its rendition does not deprive such associations of the "equal protection of the laws," although other litigants have one year within which to perfect an appeal. *Id.*..... 255
15. ——— Equal protection is secured if the law operates alike on all of the same class, provided the classification is not arbitrary or unreasonable and arises out of the business engaged in or the peculiar manner in which it is conducted. *Id.*..... 259
16. ——— The constitution does not require the same law to be applied to two distinct classes. *Id.*..... 250
17. ——— A fraternal-insurance corporation whose charter does not expressly authorize it to issue notes has no implied power to do so when such authority is

INSURANCE—CONTINUED:

- unnecessary to the exercise of power given or to accomplish the corporate purposes. *Scott v. Bankers' Union* 575
18. — Every person dealing with a corporation or with its obligations is bound to take notice of the power possessed by such corporation and of the purpose for which it was created. *Id.*..... 575
19. — The purchaser of a note executed by a corporation not having the legal power to issue such an obligation cannot recover thereon from such maker, even when the note is taken in good faith and for value. *Id.*..... 576
20. — A joint maker of a note with a corporation which does not have the power to issue such an obligation may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation. *Id.*..... 576
21. **Fraudulent Representations.**—See No. 26.
22. **Monthly Assessments.**—See Nos. 10, 11.
23. **Mutual Burial Association.**—An association to secure its members a burial in consideration of stipulated assessments held to be an insurance association. *The State v. Burial Association*..... 179
24. **Ouster.**—See Nos. 12, 13.
25. **Proceeding in Error.**—See Nos. 12-16.
26. **Rescission of Contract.**—In a suit to rescind an insurance contract on the ground of fraudulent representations, and to recover money paid thereon, judgment for plaintiff affirmed. *Insurance Co. v. Johnson*, 567
27. **Surety Bonds.**—See "SURETYSHIP AND GUARANTY."
28. **Ultra Vires Contract.**—See Nos. 17-20.

INSURANCE COMMISSIONER—See "OFFICE AND OFFICERS."

INTENTION—See "EVIDENCE," 59; "CRIMINAL LAW," 6.

"INTEREST"—See "WORDS AND PHRASES;" "TAXATION."

INTERVENOR—See "JUDGMENTS."

INTOXICATING LIQUORS:

1. **Circumstantial Evidence.**—Before a jury is justified in convicting upon circumstantial evidence alone the circumstances proved must not only all be consistent with the theory of the defendant's guilt, but they must be so strong as to exclude any other reasonable hypothesis. *The State v. Sweizewski*..... 733
2. **Injury to Wife.**—Persons engaged in a business prohibited by law, which enriches them and makes paupers and criminals of others, have no complaint against a liberal construction of a statute to make them responsible in damages to those injured as a result of the illegal traffic. *Zibold v. Reneer*..... 318
3. — Where a wife was injured in her means of support by an act committed by her intoxicated husband, the person who furnished the liquor held liable to her in damages. *Id.*..... 312

INTOXICATING LIQUORS—CONTINUED:

4. ——— The statute authorizes a recovery for both proximate and remote injuries. *Id.*..... 312
5. ——— An allegation in her petition that her husband had been convicted of murder in the first degree was not conclusive that he was not intoxicated when he committed the homicide. *Id.*..... 312
6. **Murder.**—Intoxication is not of itself a defense to a charge of murder in the first degree. *Id.*..... 320
7. ——— For a person to be too drunk to entertain an intent to kill it would seem that he would have to be too drunk to entertain an intent to shoot. *Id.*..... 320

INVOLUNTARY TESTIMONY—See “EVIDENCE,” 127-130.

ISLAND—See “WATERS AND WATER COMPANIES.”

ISSUES NOT PLEADED—See “PRACTICE, SUPREME COURT.”

J.

JOINDER OF ACTIONS—See “PRACTICE, DISTRICT COURT.”

JOINDER OF PARTIES—See “PRACTICE, DISTRICT COURT.”

JOINT DEFENDANTS—See “CRIMINAL LAW.”

JOINT MAKERS—See “NEGOTIABLE INSTRUMENTS.”

JOURNAL ENTRY—See “PRACTICE, DISTRICT COURT,” 12-17.

JUDGE AT CHAMBERS—See “PRACTICE, DISTRICT COURT.”

JUDGE OF CITY COURT—See “OFFICE AND OFFICERS.”

JUDGE OF THE DISTRICT COURT—See “PRACTICE, DISTRICT COURT.”

JUDGE PRO TEM.—See “CITIES AND CITY OFFICERS.”

JUDGMENTS:

1. **Absence of Judgment Debtor.**—See No. 35.
2. **Abstract of a Judgment.**—See Nos. 32, 47.
3. **Assignment to a Surety.**—See Nos. 25, 26.
4. **Collateral Attack.**—One claiming to act as a judge *pro tem.* of a city court held to be a *de facto* officer, whose acts and judgments could not be collaterally attacked. *Briggs v. Voss*..... 418
5. **Correction of Entry.**—See “PRACTICE, DISTRICT COURT,” 12-17.
6. **Costs.**—Where plaintiff in error did not prosecute and the hearing was had on a cross-petition in error the costs were divided. *Hanrion v. Hanrion*..... 30
7. ——— Where a petition in ejectment alleges full title, and the answer includes a general denial, coupled with a claim of a fractional interest, the plaintiff, upon proof of partial title, is entitled to a proportionate recovery and to judgment for costs. *Young v. Bigger*..... 146

JUDGMENTS—CONTINUED:

8. ——— In an action to recover for services under a contract of hiring costs in the supreme court divided. *Spaulding v. Pepper*..... 646
9. ——— The plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action. *Morrill Township v. Fletchall*..... 787
10. ——— Judgment that each party pay half the costs affirmed. *Ehram v. Jackman*..... 448
11. ——— In suits to foreclose a lien for delinquent taxes separate proceedings against individual tracts are permissible. *Whitney v. Morton County*..... 502
12. ——— In many instances there should be a joinder and the court can so order, on request, to aid in minimizing costs, unless controlled by some paramount consideration. *Id.*..... 502
13. ——— If the action of the county commissioners in ordering separate proceedings should result in palpable wrong, the court may tax any unjust increase in costs so made to the plaintiff. *Id.*..... 502
14. **Creditor.**—See "PARTIES."
15. **Erroneous—Effect on Warranty.**—A grantor by general warranty is liable upon a final judgment evicting the grantee from possession or awarding title to another upon an alleged right antedating the conveyance, provided the grantor has notice to, or does, appear, although the judgment was based on an erroneous finding that he was not the owner at the time of conveyance. *Samson v. Zimmerman*..... 654
16. **Final Determination.**—A judgment for defendant upon sustaining a demurrer to a petition is a final determination, and until set aside no further proceedings can be had looking to a trial of the issues between the parties. *Martindale v. Battey*..... 92
17. ——— No question is here involved as to the effect of the judgment as an adjudication if pleaded in any subsequent action between the parties. *Id.*..... 95
18. ——— A petition was demurred to on several grounds, including misjoinder and want of facts. The demurrer was sustained for want of facts, but the record did not show on what ground, and judgment was given for defendant, which was affirmed on the ground of misjoinder. The district court had no power at a subsequent term to permit the filing of separate petitions. *Id.*..... 92
19. **Form.**—A formal defect in a judgment held to be harmless. *Hanrion v. Hanrion*..... 29
20. **Former Judgment.**—See "PRACTICE, SUPREME COURT," 24, 25.
21. **Intervenor.**—See No. 34.
22. **Junior Lien-holder.**—See "MORTGAGES," 11, 12.
23. **On Sustaining a Demurrer** (See, also, Nos. 16-18).—Where the record does not show upon which of several grounds a demurrer to a petition was sustained, the

JUDGMENTS—CONTINUED:

- court may at a subsequent term amend the record to show that fact, if it be established by clear and satisfactory proof. *Martindale v. Battey*..... 92
24. **Ouster.**—See “INSURANCE.”
25. **Payment by a Surety.**—A surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against other sureties jointly liable with him. *Honce v. Schram*..... 368
26. ——— The payment by one of the sureties against whom it was rendered, and the taking of an assignment to himself, did not operate as a satisfaction of the judgment against the other judgment debtors. *Id.*..... 368
27. **Pleadings.**—In an action of ejectment the pleadings put in issue the ownership of the property, and it was error for the court to render judgment on the pleadings, the issue being undetermined. *McCready v. Dennis*..... 778
28. **Pleadings—Review.**—See “PRACTICE, SUPREME COURT,” 53-55.
29. **Presumption on Review.**—In a trial to the court, where the record does not show upon which of two theories a general judgment was based, one being proper, it will be presumed the judgment was entered upon that theory. *Ross v. Eastham*..... 464
30. **Proceeding in Aid of Execution.**—In a proceeding in aid of execution the probate judge acts as a subordinate officer of the district court, and in the supervision of the probate judge's action the court exercises original, rather than appellate, jurisdiction. *Honce v. Schram*..... 368
31. ——— Where such supervision was invoked by a “petition in error,” and the court considered the proceedings of the probate judge as it would a formal application, its action was not void, nor was any one prejudiced by the informality. *Id.*..... 368
32. ——— An abstract of a judgment of a justice of the peace duly filed in the district court is a sufficient basis for a proceeding in aid of execution. *Id.*..... 368
33. ——— The ownership of assets sought to be subjected to the payment of a judgment cannot be finally determined in a proceeding in aid of execution, but a colorable dispute as to ownership does not deprive the judge of power to proceed. *Id.*..... 368
34. ——— One testifying under a subpoena in a proceeding in aid of execution, who is not made a party and does not intervene to claim the property, is not bound by the order and may afterward litigate his rights. *Id.*..... 368
35. ——— Absence of a judgment debtor in a proceeding in aid of execution does not preclude the examination of other witnesses nor prevent the judge from making a proper order. *Id.*..... 369

JUDGMENTS—CONTINUED:

36. **Record.**—See Nos. 18, 23, 29; see, also, "DEMURRER," 12.
37. **Reopening Case.**—See "PRACTICE, DISTRICT COURT."
38. **Res Judicata.**—Consideration of charges against an attorney by a committee did not amount to an adjudication. *In re Smith*..... 751
39. ——— One testifying under a subpoena in a proceeding in aid of execution, who is not made a party and does not intervene to claim the property, is not bound by the order and may afterward litigate his rights. *Honce v. Schram*..... 368
40. ——— An adjudication under section 3941, legally had, is conclusive upon all persons; and the probate court of the lunatic's permanent residence may act thereon the same as if such adjudication had occurred in that court. *Foran v. Healy*..... 633
41. ——— It was held that a justice of the peace had jurisdiction in an action of forcible detainer against one who had entered into the possession of land under a contract which had become forfeited. *Dinsen v. Olson* 379
42. ——— If the defendant had any equitable rights they could be adjusted in a subsequent proceeding. *Id.*... 387
43. **Satisfaction.**—See Nos. 25, 26.
44. **Setting Aside.**—The provision authorizing new trials in criminal cases for like causes as in civil cases and the provision for instituting a proceeding to obtain a new trial within one year after final judgment do not authorize a proceeding against the state to set aside a judgment of conviction of a public offense and obtain a new trial. *The State v. Appleton*..... 160
45. ——— After the expiration of the term at which a judgment is rendered the court has no power to set it aside because of its being based on an erroneous ruling. *Martindale v. Battey*..... 92
46. **Several and Distinct.**—Several and distinct judgments, each for less than \$100, rendered against different defendants, in favor of the same plaintiff, in one action, cannot be united in a proceeding in error to give the supreme court jurisdiction. *Samp v. Braden* 279
47. **Transcript of Journal Entry.**—Filing an abstract of a justice's judgment is sufficient within the county. If the judgment is to be transferred to another county a transcript of the journal entry is required. *Honce v. Schram* 371

JUDICIAL NOTICE—See "EVIDENCE."

JUDICIAL SALES:

1. **Administrator's Sale.**—An action by heirs to recover real property descending to them but sold by an administrator upon an order of court must be begun within five years after the deed is recorded, although the sale be void for want of notice to the heirs. *O'Keefe v. Behrens*..... 469

JUDICIAL SALES—CONTINUED:

2. ——— Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based. *Id.*..... 469
3. Collateral Attack.—See Nos. 6-8.
4. Effect on Junior Lien.—See "MORTGAGES," 11, 12.
5. Foreclosure.—See "MORTGAGES."
6. Guardian's Sale.—A guardian's deed will not be held void upon a collateral attack merely because the petition for leave to sell real estate does not affirmatively show the existence of the conditions which authorize such sale. *Beachy v. Shomber*..... 62
7. ——— The notice required to be given to a ward of the hearing of his guardian's application for leave to sell real estate is jurisdictional, and a deed made without notice is void, and subject to collateral attack. *Id.*..... 62
8. ——— Where the record shows the giving of a notice to a ward of his guardian's application for leave to sell his real estate, and such notice is unavailing, it cannot be presumed from the fact that the sale was confirmed that any other notice was given. *Id.*..... 62
9. ——— An ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will if possible be given a construction that will uphold the deed. *Id.*..... 62
10. Injunction.—In a suit to enjoin a sheriff from selling real estate under an execution issued on a money judgment the judgment creditor is a proper but not a necessary party. *Barnett v. Schad*..... 414
11. Limitation of Actions.—See No. 1.
12. Purchase by a Cosurety.—A surety who converted securities into a judgment and purchased at the execution sale, rented the property, and sold it to an innocent purchaser, all without the knowledge of the principal or cosureties, held accountable to them for rents and profits. *Page v. Harper*..... 229
13. Redemption.—See "MORTGAGES."
14. Report of Appraisers.—See No. 9.
15. Tax Sale.—See "TAXATION," 8-11.
16. Void Sale.—See No. 1.

JUNIOR LIEN-HOLDER—See "MORTGAGES," 11, 12.

JURISDICTION:

1. Actions against the State.—The state cannot be sued in its own courts except with its own consent, clearly conferred by act of the legislature. *The State v. Appleton* 160
2. ——— The provision authorizing new trials in criminal cases for like causes as in civil cases and the provision for instituting a proceeding to obtain a new trial within one year after final judgment do not authorize a proceeding against the state to set aside a judgment of conviction of a public offense and obtain a new trial. *Id.*..... 160

JURISDICTION—CONTINUED:

3. — The rule is that as statutes giving the power to sue the state are in derogation of a sovereign power they should be construed strictly. *Id.*..... 164
4. Amendment of a Record.—See Nos. 23, 37-40.
5. Amount in Controversy.—See No. 86.
6. Appeal from Police Court.—See No. 25.
7. Appellate.—See Nos. 32, 33, 81, 82.
8. Application to Sell Real Estate.—See Nos. 56, 57.
9. Appointment of a Guardian.—See Nos. 58-62.
10. Board of Education.—In the absence of a statute a board of education of a city of the second class has no right to establish separate public schools for white and colored children, or to exclude a pupil for the reason *only* that such pupil is colored. *Cartwright v. Board of Education*..... 32
11. Board of Railroad Commissioners.—In giving the board of railroad commissioners supervision over railroads operated by steam the statute by implication denies them power over railroads operated only by electricity. *Railroad Co. v. Railroad Commissioners* 168
12. — In defining "railroad company" to mean a road operated by steam, the statute forbids such term's being construed to include a road operated only by electricity, except where such intention may be expressly manifested. *Id.*..... 168
13. — The authority given railroad commissioners to determine applications by one company for permission to cross the tracks of another does not apply where the line sought to be crossed is operated only by electricity. *Id.*..... 168
14. — A railway constructed to be operated only by electricity is not a railroad operated by steam within the statutory meaning, although owned and managed by a corporation authorized to use steam power. *Id.*, 168
15. — The railroad commissioners have no jurisdiction to entertain an application by a railroad company for leave to cross its track with that of a company using only electricity as a motive power. *Id.*... 168
16. — The act limiting the power of the railroad commissioners to roads operated by steam was passed in 1883. The act was remodeled in 1891. A failure then to modify the limitation indicated a purpose to confine the board's jurisdiction to that originally given, notwithstanding the modern use of electricity. *Id.* 172
17. Cause Remanded for Trial.—See Nos. 26, 27.
18. Change of Venue.—Apprehension that a judge is prejudiced is not enough to require a change of venue, but it must satisfactorily appear that prejudice in fact exists. *In re Smith*..... 743

JURISDICTION—CONTINUED:

19. **City Court.**—One claiming to act as a judge *pro tem.* of a city court held to be a *de facto* officer, whose acts and judgments could not be collaterally attacked. *Briggs v. Voss*..... 418
20. **Commencement of Injunction Suit.**—See No. 41.
21. **District Court.**—A district judge at chambers has power to dissolve a restraining order granted by a probate judge. *Hurd v. Railway Co.*..... 83
22. ——— After the expiration of the term at which a judgment is rendered the court has no power to set it aside because of its being based on an erroneous ruling. *Martindale v. Battey*..... 92
23. ——— Where the record does not show upon which of several grounds a demurrer to a petition was sustained, the court may at a subsequent term amend the record to show that fact, if it be established by clear and satisfactory proof. *Id.*..... 92
24. ——— A petition was demurred to on several grounds, including misjoinder and want of facts. The demurrer was sustained for want of facts, but the record did not show on what ground, and judgment was given for defendant, which was affirmed on the ground of misjoinder. The district court had no power at a subsequent term to permit the filing of separate petitions. *Id.*..... 92
25. ——— Upon an appeal from the police court the bond was signed by the defendant alone, and approved by the police judge. It was error for the district judge to dismiss the appeal because the bond lacked the signature of a surety. *Ottawa v. Johnson*, 165
26. ——— After judgment remanding a disbarment appeal for trial, it is not essential that the accusation be refiled in the district court. *In re Burnette*..... 610
27. ——— Omission to make a specific order relating to the transfer and custody of the accusation does not deprive the district court of jurisdiction, and if the accusation be accessible to the court and the accused during the trial he sustains no injury of which he can complain. *Id.*..... 610
28. ——— Service upon a guardian held to confer jurisdiction upon a district court to adjudicate the rights of a lunatic in a foreclosure proceeding. *Foran v. Healy* 633
29. ——— A lunatic whose property was sold under foreclosure had no right to redeem the property after his restoration to sanity because the court did not acquire jurisdiction by service upon his guardian. *Id.* 633
30. ——— Section 4 of chapter 320 of the Laws of 1905 is prospective, and not retrospective, in its operation, and confers no power upon a trial judge who had, prior to the passage of the act, lost jurisdiction to settle a case-made. *Douglas County v. Woodward*... 238
31. ——— Where a motion for a new trial was not necessary the filing of such motion did not enlarge the

JURISDICTION—CONTINUED:

- time within which an extension could be granted to make and serve a case-made, and jurisdiction to make the order was lost. *Wagner v. Railway Co.*..... 283
32. — In a proceeding in aid of execution the probate judge acts as a subordinate officer of the district court, and in the supervision of the probate judge's action the court exercises original, rather than appellate, jurisdiction. *Honce v. Schram*..... 368
33. — Where such supervision was invoked by a "petition in error," and the court considered the proceedings of the probate judge as it would a formal application, its action was not void, nor was any one prejudiced by the informality. *Id.*..... 368
34. — An abstract of a judgment of a justice of the peace duly filed in the district court is a sufficient basis for a proceeding in aid of execution. *Id.*..... 368
35. — The ownership of assets sought to be subjected to the payment of a judgment cannot be finally determined in a proceeding in aid of execution, but a colorable dispute as to ownership does not deprive the judge of power to proceed. *Id.*..... 368
36. — A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Keeler v. Lauer* 388
37. — A district judge can correct a judgment entry after the expiration of the term, upon his personal knowledge of what took place. *Christisen v. Bartlett*, 401
38. — The power of a district judge to correct a judgment entry is not lost by lapse of time and may in his discretion be exercised on his own motion and without notice to the parties affected. *Id.*..... 404
39. — Possibly conditions might arise in which a failure to give notice would tend to show an abuse of discretion. *Id.*..... 407
40. — The indorsement by an attorney of a journal entry does not estop the denial of its correctness. *Id.*, 403
41. — Where the judge and clerk of the district court is each authorized to do a certain act, and the authority for each act is dependent upon the previous action of the other, either may act first. If the acts follow one another within a reasonable time they will be regarded as done at the same time. *Barnett v. Schad* 414
42. — Where partition proceedings were had upon the theory that part of the land had washed away, and allotments were made proportional to the quantity that remained, and subsequently the submerged land reappeared, the owners were entitled to partition of the undivided land, with its accretions, on the equitable ground of mistake as to the existence of a part of the subject-matter of the former suit. *Fowler v. Wood* 513
- 42a. Error from Probate Court.—See Nos. 32, 33.
43. Exclusive.—See No. 58.

JURISDICTION—CONTINUED:

44. **Filing Separate Petitions.**—See No. 24.
45. **Injunction.**—A suit to enjoin the closing of an undergrade crossing of a railroad operates in *personam*, and is not one of those required to be brought in the county in which the subject of the action is situated. *Railway Co. v. Wynkoop*..... 590
46. ——— This is not an action to recover real property, nor for the determination of an interest therein. *Id.*..... 592
47. **Judge at Chambers.**—See No. 21.
48. **Justice of the Peace.**—The bill of particulars involved examined and held not to state a cause of action for trespass on real estate within the meaning of the justices' code. *Wilkins v. Lee*..... 321
49. ——— The bill of particulars should be given a liberal interpretation in favor of jurisdiction. *Id.*..... 323
50. ——— It was held that a justice of the peace had jurisdiction in an action of forcible detainer against one who had entered into the possession of land under a contract which had become forfeited. *Dineen v. Olson*..... 379
51. ——— If the defendant had any equitable rights they could be adjusted in a subsequent proceeding. *Id.*... 387
52. **Limitation—Insanity Inquisition.**—See No. 59.
53. **Method of Invoking.**—See No. 38.
54. **Notice—Guardian's Application.**—See Nos. 56, 57.
55. **Original.**—See Nos. 32, 33, 78-80.
56. **Probate Court.**—The notice required to be given to a ward of the hearing of his guardian's application for leave to sell real estate is jurisdictional, and a deed made without notice is void, and subject to collateral attack. *Beachy v. Shomber*..... 62
57. ——— Where the record shows the giving of a notice to a ward of his guardian's application for leave to sell his real estate, and such notice is unavailing, it cannot be presumed from the fact that the sale was confirmed that any other notice was given. *Id.*..... 62
58. ——— Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence. *Foran v. Healy*..... 633
59. ——— The authority given probate courts (Gen. Stat. 1901, § 3941) to inquire into the sanity of persons in their county is a police regulation, and jurisdiction ends with the adjudication and commitment or discharge of such person. *Id.*..... 633
60. ——— An adjudication under section 3941, legally had, is conclusive upon all persons; and the probate court of the lunatic's permanent residence may act thereon the same as if such adjudication had occurred in that court. *Id.*..... 633
61. ——— Except as limited by statute, probate courts have the same power over the person and estate of lunatics that was formerly possessed by courts of chancery under the common law. *Id.*..... 640

JURISDICTION—CONTINUED:

62. — In the absence of a statute no notice is necessary to confer authority upon a probate court to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind. *Id.*..... 640
63. — A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Keeler v. Lauer* 388
64. — An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath. *O'Keefe v. Behrens*..... 469
65. — Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based. *Id.*..... 469
- 65a. Proceeding in Aid of Execution.—See Nos. 32-35.
66. *Quo Warranto*.—An original proceeding to remove a sheriff from office dismissed because the controversy could better be heard in the district court. *The State v. Welfelt* 791
67. Refiling of Accusation.—See Nos. 26, 27.
68. Relief from Mistake.—See No. 42.
69. Service of Process.—A managing agent within the meaning of the term of the statute providing for the service of summons upon a managing agent of a foreign corporation defined. *Betterment Co. v. Reeves*.. 107
70. — The various methods provided by statute for obtaining service of process on foreign corporations are cumulative. *Id.*..... 107
71. — One in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county. *Underwood v. Fosha*..... 408
72. Service upon a Guardian.—See Nos. 28, 29.
73. Setting Aside a Judgment.—See No. 22.
74. Settlement of a Case-made.—See Nos. 30, 31.
75. Signing of Petition.—An objection that a petition is not signed by the plaintiff has no force where it is signed by his attorneys. *New v. Smith*..... 178
76. Supreme Court.—No degree of diligence will excuse the plaintiff in error from filing a transcript or a case-made with his petition in error. The provisions of the statute are jurisdictional and mandatory. *Kennard v. Alexander*..... 30
77. — Where a transcript is in fact filed with the petition in error, and there is a mistake or material omission therein, it is within the jurisdiction of this court to allow an amendment within the year at least. *Id.* 31
78. — The original jurisdiction of the supreme court is confined to proceedings in *quo warranto*, man-

JURISDICTION—CONTINUED:

- damus, and *habeas corpus*; and in these matters some special reason must exist for invoking its powers or parties will be relegated to courts of general jurisdiction for relief. *In re Burnette*. 609
79. ——— The legislature cannot enlarge the scope of the original jurisdiction of this court, either directly by authorizing the primary consideration of cases other than those specified in the constitution, or indirectly by including such cases within its review power on appeal. *Id.*. 609
80. ——— The jurisdiction to consider causes *de novo* on appeal, and to decide them on the law and the evidence according to the right of the case, independent of the rulings and judgment of the lower court, is original and not appellate. *Id.*. 610
81. ——— The appellate jurisdiction of the supreme court is limited to expounding the law and correcting errors appearing on the record in the proceedings of inferior courts, whether such proceedings be presented for review by proceedings in error or by appeal. *Id.*. 609
82. ——— The statute relating to appeals in disbarment cases providing for a transfer to this court of the original papers and a transcript of the docket, to be finally considered, does not authorize a trial *de novo* but creates a special method for bringing such causes to this court for consideration under its appellate jurisdiction. *Id.*. 610
83. ——— Case dismissed because trial judge had lost jurisdiction to settle case-made. *Douglas County v. Woodward* 238
84. ——— A proceeding in error to reverse a judgment against a fraternal benefit association must be commenced within sixty days after the rendition of the judgment. *Daughters of Justice v. Swift*. 255
85. ——— If no appeal be taken, and the judgment be not paid, an action of ouster will lie against the association. *Id.*. 257
86. ——— Several and distinct judgments, each for less than \$100, rendered against different defendants, in favor of the same plaintiff, in one action, cannot be united in a proceeding in error to give the supreme court jurisdiction. *Samv v. Braden*. 279
87. Trespass on Real Estate.—See Nos. 48, 49.
88. Trial *de Novo*.—See Nos. 79, 80, 82.

JURY AND JURORS:

1. Argument to Jury.—See "PRACTICE, DISTRICT COURT."
2. Circumstantial Evidence.—See "CRIMINAL LAW."
3. Consultation.—An instruction in a criminal case which implies that each juror is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous. *The State v. Logan*. 730
4. Excessive Verdict.—See "DAMAGES."

JURY AND JURORS—CONTINUED:

5. **Failure to Summon.**—The failure to provide for the attendance of a jury must be regarded as one of the very things the constitutional guaranty of a speedy trial was designed to meet. *The State v. Dewey*..... 742
6. **General Verdict** (See, also, Nos. 20-22, 24, 29).—If a general verdict was desired it should have been asked for before the jury were discharged. *Smyser v. Fair*..... 773
7. **Grand Jury.**—Statements by a defendant in a criminal action in denial of guilt before a grand jury are not confessions within the rule requiring them to have been made voluntarily before they are competent evidence against him. *The State v. Campbell*..... 688
8. ——— Testimony before the grand jury in obedience to a subpoena is not involuntary. He may refuse to give answers which tend to incriminate him, and by the failure to exercise his privilege his statements become voluntary. *Id.*..... 688
9. ——— Voluntary statements made by a defendant, which do not tend to establish his guilt but are exculpatory, are competent evidence against him as admissions of a party. *Id.*..... 689
10. ——— The statute prohibiting grand jurors from disclosing evidence given before them or the name of any witness, except when lawfully required to testify, is not limited by the statute which permits such evidence in certain cases. *Id.*..... 689
11. ——— Grand jurors may testify to what passed before them when, after the purpose of secrecy imposed by the common law and the statutes has been effected, such disclosure is necessary to further justice or protect public or individual rights. *Id.*..... 689
12. **Individual Responsibility.**—See No. 3.
13. **Method of Ascertaining Value.**—In a condemnation proceeding it is error to permit the jury, as a basis for estimating the value of the land, to consider evidence of the purchase-price. *Dethampl v. Irrigation Co.*..... 57
14. **Passion and Prejudice.**—See No. 24.
15. **Question of Fact.**—See "PRACTICE, DISTRICT COURT."
16. **Special Findings.**—A refusal to require special findings to be made more specific is not error when such answers, if made as requested, would not differ in legal effect from those already made. *Railway Co. v. Brickell*..... 274
17. ——— Where a second effort to obtain a specific answer failed, it is not to be presumed that a better result would have been obtained by still other efforts; nor did the defendant waive its right to object to the finding by failing to request to have the effort repeated. *Railway Co. v. Dorr*..... 487
18. ——— There was a finding that the injury would not have occurred but for the defect; that the company had no actual knowledge of its existence; that it

JURY AND JURORS—CONTINUED:

- had existed "for some time previous to the accident." Held that the latter finding is too indefinite to support a recovery. *Id.*..... 486
19. ——— A finding of a jury upon a specific and controlling question must be deemed to be as full and definite an answer as the testimony in the case will warrant. *Id.*..... 487
20. ——— The general rule is that the general verdict yields to the special findings. *Id.*..... 492
21. ——— Where a special finding is apparently destructive of the general verdict, if there be any material fact not submitted for a special finding, which if found favorably to the general verdict would overcome the adverse finding, it must be presumed that the jury determined such omitted fact in harmony with the general verdict. *Samson v. Zimmerman*... 654
22. ——— In an action of forcible entry and detainer the special findings did not authorize a judgment in favor of the plaintiff. *West v. Comeaux*..... 272
23. ——— Whether the answer "do not know" to a special question is equivalent to "yes," or "no," depends upon the form of the question. Generally such an answer shows that the party whose duty it was to establish the fact involved in the question has failed in his proof. *Croan v. Baden*..... 364
24. ——— Where the testimony warranted damages for physical and mental pain, loss of time, and permanent injury, and the general verdict was reasonable, but in answer to special questions relating only to mental suffering the jury said the entire sum was allowed for that element, the failure to allow for other elements of damages did not indicate passion or prejudice, and the verdict was not excessive. *Railway Co. v. Wade*..... 359
25. Statement by Counsel.—It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Hall v. Davidson*..... 88
26. Statutory Construction.—It was not error to include a statutory phrase in an instruction. This did not leave the construction of the statute to the jury. *Haines v. Goodlander*..... 191
27. Trial by Jury.—A dispute regarding a boundary does not in a proper sense involve title to real estate and it is not a controversy in which a jury trial may be demanded as a matter of right. *Mathis v. Strunk* 597
28. Verdict and Evidence.—See "PRACTICE, SUPREME COURT," Nos. 41, 42, 44-46.
29. Verdict—Sufficiency.—Where an information charges substantially the same offense in several counts, a verdict of guilty which fails to refer to any specific count is sufficient, and will be regarded as a finding of guilty upon all of them. *The State v. Ricksecker* 495

JURY AND JURORS—CONTINUED:

30. **Withdrawal of a Defense.**—See "PRACTICE, DISTRICT COURT."

31. **Withdrawal of Testimony.**—See "PRACTICE, DISTRICT COURT."

JUSTICE OF THE PEACE—See "PRACTICE, JUSTICE OF THE PEACE;" "FORCIBLE ENTRY AND DETAINER."

L.

LACHES—SUIT FOR DIVORCE—See "LIMITATION OF ACTIONS," 11, 12.

LATENT DEFECT—See "MORTGAGES."

LAW OF THE CASE (FORMER DECISION)—See "PRACTICE, SUPREME COURT."

LIABILITY OF ADMINISTRATORS—See "CONTRACTS."

LIABILITY OF MANAGING OFFICER—See "CORPORATIONS."

LIEN EXTINGUISHED—See "RAILROADS."

LIEN FOR FEES—See "ATTORNEYS."

LIEN FOR TAXES—See "TAXATION."

LIEN (JUNIOR)—See "MORTGAGES," 11, 12.

LIMITATION OF ACTIONS:

1. **Acknowledgment of a Debt.**—See Nos. 35, 36.
2. **Action by Heirs.**—An action by heirs to recover real property descending to them but sold by an administrator upon an order of court must be begun within five years after the deed is recorded, although the sale be void for want of notice to the heirs. *O'Keefe v. Behrens* 469
3. **Adverse Possession.**—Occupancy of land through a mistake as to the boundary-line cannot set the statute of limitations to running so as to give title by adverse possession. *Mathis v. Strunk*..... 596
4. **Conflict of Laws.**—The laws of Kansas relating to the limitation of actions apply exclusively in this state, except when the requirements of the statute permitting the law of another state to be applied have been complied with. *Croan v. Baden*..... 364
5. **Contest of a Will.**—An order probating a will determines its due attestation, execution, and validity, and an interested person must contest the will, if at all, within two years, unless under legal disability. *Keeler v. Lauer*..... 388
6. ——— A creditor of an heir who claims that the devised property has passed to the heir occupies no better position than the heir himself. *Id.*..... 388
7. **Default by Mortgagor.**—See No. 22.
8. **Disbarment of Attorneys.**—There is no statute of limitation which is technically applicable to a disbarment proceeding. *In re Elliott*..... 151

LIMITATION OF ACTIONS—CONTINUED:

9. ——— Alleged misconduct of an attorney held to be too stale to be considered. *Id.*..... 151
10. ——— In a proceeding for the disbarment of an attorney the statute of limitations is no defense. *In re Smith* 744
11. Divorce.—The general statutes of limitation of this state have no application to suits for divorce. *Cullison v. Cullison*..... 281
12. ——— Long delay in commencing the suit has been taken into account in determining the sincerity of the party; but it has always been held a subject of explanation. *Id.*..... 282
13. Ejectment by Tax-deed Holder.—Where a tax deed, valid on its face, has been recorded five years, with the holder in actual possession, and one claiming adversely dispossesses him by force, fraud, or stealth, the holder of the deed may maintain ejectment to regain what was wrongfully taken from him. *Nicholson v. Hale*..... 599
14. ——— The two-year statute of limitations has no application to such a case. *Id.*..... 599
15. Estoppel.—When land was conveyed by warranty deed, both parties knowing that a claimant occupied it, and the grantor undertook by litigation to clear the title, and represented that he would do so, and the grantee relied thereon, the grantor was estopped in an action on the warranty to plead the statute of limitations. *Railway Co. v. Pratt*..... 210
16. Extending Time to Serve a Case-made.—See "PRACTICE, SUPREME COURT," 14.
17. Foreclosure of Tax Lien.—The statute requiring actions to enforce a liability created by statute to be commenced within three years has no application to suits brought to enforce tax liens. *Whitney v. Morton County* 502
18. Injunction—Public Improvements.—When a petition for public improvements purports to have the requisite number of signers, and a landowner files a written protest, and the mayor and council consider the petition and protest and order the improvements made, their action is a conclusive determination of the sufficiency of the petition. *Railroad Co. v. Kansas City* 571
19. ——— Such landowner cannot question the validity of the proceedings in a suit to enjoin the assessments unless such suit is brought within thirty days from the time the amount of the assessment is ascertained. *Id.* 571
20. Insurance Certificate.—See "INSURANCE," 10, 11.
21. Junior Lien-holder.—See "MORTGAGES," 11, 12.
22. Mortgage.—A condition that a default in the payment of taxes should mature the mortgage debt did not, upon such default, start the statute to running. *Walters v. Chance*..... 682
23. Mortgagor—Quieting Title.—The law does not permit a mortgagor to quiet title against the holder of

LIMITATION OF ACTIONS—CONTINUED:

- his mortgage on the naked ground that the right to foreclose the mortgage has become barred by the statute of limitations. *Gibson v. Johnson*..... 261
24. **New Promise.**—See Nos. 35, 36.
25. **Proceeding for a New Trial.**—The provision authorizing new trials in criminal cases for like causes as in civil cases and the provision for instituting a proceeding to obtain a new trial within one year after final judgment do not authorize a proceeding against the state to set aside a judgment of conviction of a public offense and obtain a new trial. *The State v. Appleton*, 160
26. **Proceeding in Error.**—A proceeding in error to reverse a judgment against a fraternal benefit association must be commenced within sixty days after the rendition of the judgment. *Daughters of Justice v. Swift* 255
27. ——— If no appeal be taken, and the judgment be not paid, an action of ouster will lie against the association. *Id.*..... 257
28. ——— No degree of diligence will excuse the plaintiff in error from filing a transcript or a case-made with his petition in error. The provisions of the statute are jurisdictional and mandatory. *Kennard v. Alexander* 30
29. ——— Where a transcript is in fact filed with the petition in error, and there is a mistake or material omission therein, it is within the jurisdiction of this court to allow an amendment within the year at least. *Id.*..... 31
30. ——— Leave to amend a petition in error by adding new matter denied because the time within which errors in the case might have been presented had expired. *Brewer v. Moyer*..... 756
31. **State.**—Statutes of limitation do not apply to the state except by specific reference. *Whitney v. Morton County* 505
32. **Statute as a Defense.**—The laws of Kansas relating to the limitation of actions apply exclusively in this state, except when the requirements of the statute permitting the law of another state to be applied have been complied with. *Crown v. Baden*..... 364
33. ——— The statute of limitations, to be available as a defense, must be affirmatively pleaded or otherwise asserted, and a failure to do so constitutes a waiver of such defense. *Id.*..... 364
34. **Tax Deed.**—See "TAXATION."
35. **Tolling Statute.**—Letters attached to a petition in a foreclosure suit, alleged to have been written by one of the makers of the note to the payee, held to be a *prima facie* acknowledgment of the debt so as to toll the statute of limitations. *Disney v. Healey*..... 326
36. ——— A grantee who assumes a mortgage is liable to the mortgagee, though the note would have been barred by the statute of limitations but for an ac-

LIMITATION OF ACTIONS—CONTINUED:

knowledge by the grantor which tolled the statute as to him, provided such acknowledgment was made before the conveyance. *Id.*..... 326

37. Void Administrator's Sale.—See No. 2.

38. Waiver of Statute.—See No. 33.

LIQUORS—See "INTOXICATING LIQUORS."

LOSS OF MARKET—See "DAMAGES."

M.

MALICIOUS PROSECUTION—See "DAMAGES."

MANAGING AGENT—See "AGENCY."

MANDAMUS—See "PARTIES."

MANSLAUGHTER—See "CRIMINAL LAW."

MARKET (VALUE, LOSS, DEPRECIATION) — See "DAMAGES," 15-18, 24-26.

MARRIED WOMAN'S CONTRACT—See "HUSBAND AND WIFE."

MASTER AND SERVANT — See "RAILROADS;" "DAMAGES," 103-105; "CONTRACTS," 21.

MAYOR AND COUNCIL — See "CITIES AND CITY OFFICERS."

MEASURE OF DAMAGES—See "DAMAGES."

MEMBERSHIP (APPLICATION FOR)—See "INSURANCE."

MENTAL INCAPACITY—See "GUARDIAN AND WARD."

MENTAL SUFFERING—See "DAMAGES."

MINOR (ADMISSION TO SCHOOL)—See "SCHOOLS AND SCHOOL-LAND."

MISAPPROPRIATION OF FUNDS—See "AGENCY," 18.

MISCONDUCT—See "ATTORNEYS;" "CORPORATIONS," 15.

MISTAKE — See "WATERS AND WATER COMPANIES," 12; "SURVEYS AND BOUNDARIES."

MONOPOLIES:

1. Antitrust Law.—See Nos. 2-6.

2. **Combinations Restricting Competition.**—The statute of 1891 prohibiting combinations to prevent competition among persons engaged in buying and selling live stock is superseded by the general antitrust law of 1897, and is no longer in force. *The State v. Wilson* 343

3. ——— An association engaged in buying and selling live stock, practically controlling that business, which has a by-law forbidding its members to buy or sell for others without charging a stated commission, is a combination to restrict the pursuit of a lawful business, and is a trust. *Id.*..... 343

56—73 KAN.

MONOPOLIES—CONTINUED:

4. ——— Charging a commission for purchasing live stock for another, by a member of such a trust, in pursuance of the by-law referred to, is a misdemeanor, and a contract to pay a commission exacted under such circumstances is void. *Id.*..... 343
5. ——— In a prosecution for obtaining money by false pretenses through selling as clear cattle that were in fact mortgaged, the defendant may show that the mortgage, although fair on its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute. *Id.*..... 344
6. ——— The allegation that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage. *Id.*..... 358
7. ——— A contract for paving the streets of a city held void under a statute requiring such contracts to be let to the lowest bidder, and contrary to public policy in restricting competition.
Surety Co. v. Brick Co...... 196
Atkin v. Coal Co...... 768
8. ——— Where a contract for paving is void for restricting competition in the purchase of materials, all the proceedings are void, and one furnishing material with knowledge of the facts constituting the illegality cannot recover against the surety on the contractor's bond. *Id.*.....197, 768
9. Dealing in Live Stock.—See Nos. 2-6.
10. Public Improvements.—See Nos. 7, 8.
11. Surety Bonds.—The legislature may require persons contracting to improve city streets to give bonds executed by some security company authorized to do business within the state. *Parker-Washington Co. v. Kansas City* 722

MONTHLY ASSESSMENTS—See "INSURANCE."

MORTGAGES:

1. After-acquired Title.—See Nos. 6-8.
2. Assumption by Grantee.—See No. 34.
3. Condition Broken.—A peaceable entry into possession of unoccupied land, and continued possession, by a mortgagee after condition broken, is a defense to ejectment by the owner, until the mortgage lien has been satisfied. *Walters v. Chance*..... 680
4. ——— A condition that a default in the payment of taxes should mature the mortgage debt did not, upon such default, start the statute to running. *Id.*..... 682
5. Consideration Paid by Another.—See Nos. 28, 29.
6. Convey no Title.—A mortgage in this state, being merely security for a debt, conveys no title and is not an "alienation" within the meaning of the statutes of the United States. *Stark v. Morgan*..... 453

MORTGAGES—CONTINUED:

7. ——— A mortgage made by a homestead claimant prior to final proof, for any purpose not intended to transfer title in evasion of the statute, is not void nor contrary to law. *Id.*..... 458
8. ——— Such a mortgagor, after acquiring title from the government, will be estopped from defeating the enforcement of the mortgage lien. His after-acquired title inures to the benefit of the mortgagee. *Id.*..... 453
9. Evidence of Perjury.—A mortgage given before final proof does not stand in the way of the claimant's honest oath upon final proof. *Id.*..... 463
10. Failure of Consideration.—A purchase-money mortgage executed by the grantee of a warranty deed held ineffectual by a failure of consideration. *Harrington v. Lowe* 24
11. Foreclosure.—Real estate once sold pursuant to a judgment of foreclosure cannot again be sold upon a judgment lien inferior thereto, under which the holder of the judgment had a right to redeem within fifteen months after the foreclosure sale. *Gille v. Enright.*.. 245
12. ——— Where a junior lien-holder causes execution to be levied on real estate once sold under foreclosure, and procures a sheriff's deed, he acquires no title and cannot complain of any judgment rendered in a suit by one in possession, after his right of redemption had expired, to quiet title. *Id.*..... 245
13. ——— Where a note was payable at a bank, and was not due, and was paid to one not connected with the bank, who did not have possession of the note, and the agency was controverted, statements of the alleged agent when the papers were executed, unknown to the mortgagee, that the interest might be paid to him, were inadmissible. *Goodyear v. Williams.*..... 192
14. ——— So of letters written by the plaintiff to the alleged agent relating to specific claims against other persons and of which defendant had no knowledge at the time of payment. *Id.*..... 192
15. ——— So of entries in a loan register, not a book of accounts, kept by the alleged agent, unknown to plaintiff or defendant at the time of payment. *Id.*... 192
16. ——— Service upon a guardian held to confer jurisdiction upon a district court to adjudicate the rights of a lunatic in a foreclosure proceeding. *Foran v. Healy* 633
17. ——— A lunatic whose property was sold under foreclosure had no right to redeem the property after his restoration to sanity because the court did not acquire jurisdiction by service upon his guardian. *Id.*, 633
- 17a. Homestead.—See Nos. 6-9.
18. Illegal Consideration.—In a prosecution for obtaining money by false pretenses through selling as clear cattle that were in fact mortgaged, the defendant may show that the mortgage, although fair on its face, was void by reason of being based in part upon a consideration made illegal by the antitrust statute. *The State v. Wilson.*..... 344

MORTGAGES—CONTINUED:

19. ——— The allegation that a defendant obtained money by false pretenses through the sale of property represented to be clear when in fact there was a mortgage upon it can only be responded to by proof of the existence of a valid mortgage. *Id.*..... 358
20. ——— A note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. *Id.*..... 343
21. ——— Where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both of the notes and the mortgage are wholly void. *Id.*..... 343
22. Latent Defect.—See Nos. 18-21.
23. Mortgagee in Possession.—See No. 3.
24. Mortgagor Estopped.—See Nos. 6-8.
25. Not a Conveyance.—See Nos. 28, 29.
26. Not an Alienation.—See Nos. 6-8.
27. Redemption.—See Nos. 11, 16, 17.
28. Resulting Trust.—Where one lends money upon notes secured by mortgages on real estate, which notes and mortgages he retains in his possession, they are assets of his estate upon his death although made payable to a third person. *Hanrion v. Hanrion*, 25
29. ——— A mortgage of real estate is not a conveyance within the meaning of the statute which provides that when a conveyance is made to one person upon a consideration paid by another no use or trust shall result in favor of the latter, but the title shall vest in the former. *Id.*..... 25
30. Second Sale of Mortgaged Property.—See Nos. 11, 12.
31. Statute of Limitations.—The law does not permit a mortgagor to quiet title against the holder of his mortgage on the naked ground that the right to foreclose the mortgage has become barred by the statute of limitations. *Gibson v. Johnson*..... 261
32. ——— A condition that a default in the payment of taxes should mature the mortgage debt did not, upon such default, start the statute to running. *Walters v. Chance* 682
33. ——— Letters attached to a petition in a foreclosure suit, alleged to have been written by one of the makers of the note to the payee, held to be a *prima facie* acknowledgment of the debt so as to toll the statute of limitations. *Disney v. Healey*..... 326
34. ——— A grantee who assumes a mortgage is liable to the mortgagee, though the note would have been barred by the statute of limitations but for an acknowledgment by the grantor which tolled the statute as to him, provided such acknowledgment was made before the conveyance. *Id.*..... 326
35. Suit to Quiet Title.—See No. 31.

MOTIONS—See "PRACTICE, DISTRICT COURT."

MULTIFARIOUS STATUTE — See "CONSTITUTIONAL LAW."

MUNICIPAL CORPORATIONS — See "CITIES AND CITY OFFICERS;" "OFFICE AND OFFICERS;" "SCHOOLS AND SCHOOL-LAND."

MURDER—See "CRIMINAL LAW."

MUTUAL BURIAL ASSOCIATION—See "INSURANCE."

N.

NAMES INDORSED ON INDICTMENT—See "CRIMINAL LAW."

NAVIGABLE RIVER — See "WATERS AND WATER COMPANIES."

NECESSARY PARTIES—See "PARTIES."

NEGLIGENCE:

1. Contributory.—See "DAMAGES."
2. Evidence.—See "EVIDENCE."
3. Injury by Fire.—See "RAILROADS."
4. Injury to Stock in Transit.—See "RAILROADS."
5. Managing Agent.—See "AGENCY," 18.
6. Non-delivery of Freight.—See "RAILROADS."
7. Personal Injuries.—See "DAMAGES."
8. Question of Law or Fact.—See "DAMAGES," 82, 83.
9. Trespassing Cattle.—See "PRACTICE, JUSTICE OF THE PEACE," 1, 2.

NEGOTIABLE INSTRUMENTS:

1. Authority of Agent (See, also, Nos. 15 - 18).—Whether an alleged agent had authority to sign a note was held to be a question for the jury. *Duncan v. Huse* 432
2. *Bona Fide* Holder.—See Nos. 6-8, 26.
3. Check — Evidence of Bribery.—See "CRIMINAL LAW," 7.
4. Consideration.—Between the original parties to a bill or note the consideration may always be inquired into. *Deming v. Wallace* 291
5. Delay—Rights of Drawer.—See No. 7.
6. Demand of Payment.—When presentation and demand of payment of a bank-check must be made discussed. *Cox v. Bank* 789
7. ——— Delay in forwarding and presenting a check, if no loss occur to the drawer, held not to be a defense against a recovery by a *bona fide* holder. *Id.*... 789
8. Joint Maker.—A joint maker of a note with a corporation which does not have the power to issue such an obligation may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation. *Scott v. Bankers' Union*... 576

NEGOTIABLE INSTRUMENTS—CONTINUED:

9. ——— The release by the holder of a note of one or more joint makers does not discharge other joint makers, except as to the proportional amount payable by those released. *Smith v. White*..... 607
10. **Lost Note—Deceased Maker.**—Evidence held sufficient to uphold a verdict in favor of defendant in an action on a lost note of a deceased maker. *Haines v. Goodlander* 183
11. ——— Proof that plaintiff was financially embarrassed at the time the note was claimed to have been given was properly received. *Id.*..... 183
12. **Notice of Corporate Powers.**—See Nos. 26, 29.
13. **Payment.**—An offer by a guarantor to pay an overdue note, accompanied by a display of the money, did not amount to a tender of payment, although the creditor said he preferred the note, the offer being contingent on the creditor's desiring payment. *Crane v. Bank* 237
14. **Payment before Maturity.**—See Nos. 15-18.
15. **Payment to Agent.**—Where a note was payable at a bank, and was not due, and was paid to one not connected with the bank, who did not have possession of the note, and the agency was controverted, statements of the alleged agent when the papers were executed, unknown to the mortgagee, that the interest might be paid to him, were inadmissible. *Goodyear v. Williams* 192
16. ——— So of letters written by the plaintiff to the alleged agent relating to specific claims against other persons and of which defendant had no knowledge at the time of payment. *Id.*..... 192
17. ——— So of entries in a loan register, not a book of accounts, kept by the alleged agent, unknown to plaintiff or defendant at the time of payment. *Id.*..... 192
18. ——— Where a debtor pays a note not due to a third person who does not have possession of it there is a *prima facie* presumption that the person receiving the money does so as the agent for the debtor. *Id.* 192
19. **Possession.**—See Nos. 15-18.
20. **Presentation.**—See Nos. 6, 7.
21. **Proof of Fraud.**—See No. 11.
22. **Restrictive Indorsement.**—See No. 25.
23. **Set-off.**—In an action on a note, to which defendants pleaded a set-off, judgment for plaintiff affirmed. *Root v. Wolff*..... 777
24. **Statute of Limitations.**—Letters attached to a petition in a foreclosure suit, alleged to have been written by one of the makers of the note to the payee, held to be a *prima facie* acknowledgment of the debt so as to toll the statute of limitations. *Disney v. Healey* 326
25. **Title as Trustee.**—The fact that a draft charged to have been fraudulently obtained was made payable

NEGOTIABLE INSTRUMENTS—CONTINUED:

- to defendant "for the use of" the person alleged to have been defrauded did not conclusively show that the defendant acquired title to it only as a trustee. *The State v. Wilson*..... 385
26. *Ultra Vires Contract*.—The purchaser of a note executed by a corporation not having the legal power to issue such an obligation cannot recover thereon from such maker, even when the note is taken in good faith and for value. *Scott v. Bankers' Union*... 576
27. ——— A joint maker of a note with a corporation which does not have the power to issue such an obligation may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation. *Id.*..... 576
28. ——— A fraternal-insurance corporation whose charter does not expressly authorize it to issue notes has no implied power to do so when such authority is unnecessary to the exercise of power given or to accomplish the corporate purposes. *Id.*..... 575
29. ——— Every person dealing with a corporation or with its obligations is bound to take notice of the power possessed by such corporation and of the purpose for which it was created. *Id.*..... 575

NEWLY DISCOVERED EVIDENCE—See "EVIDENCE."

NEW PROMISE—See "LIMITATION OF ACTIONS."

NEW TRIAL—See "PRACTICE, DISTRICT COURT."

NOMINAL PLAINTIFF—See "PARTIES."

NON-DELIVERY OF FREIGHT—See "RAILROADS."

NON-RESIDENT—See "LIMITATION OF ACTIONS," 4.

NON-USER—See "RAILROADS," 11.

NOTES—See "NEGOTIABLE INSTRUMENTS."

NOTICE:

1. Agency.—See "AGENCY," 4-7.
2. Application to Sell Real Estate.—See "GUARDIAN AND WARD."
3. Appointment of a Guardian.—See "GUARDIAN AND WARD."
4. Claim for Damages.—See "RAILROADS," 56-58.
5. Claim of Possession (See, also, "CONVEYANCES," 3). —One who as attorney brought unlawful detainer in another's name held estopped to deny that the nominal plaintiff was the real party in interest and entitled to settle the litigation, although defendant had notice that the attorney claimed to be himself entitled to possession. *Edwards v. Sourbeer*..... 224
6. Corporate Powers.—See "NEGOTIABLE INSTRUMENTS."
7. Correction of Journal Entry.—The power of a district judge to correct a judgment entry is not lost by lapse of time, and may in his discretion be exercised on his own motion and without notice to the parties affected. *Christisen v. Bartlett*..... 404

NOTICE—CONTINUED:

8. ——— Possibly conditions might arise in which a failure to give notice would tend to show an abuse of discretion. *Id.*..... 407
9. Covenantor—Eviction of Covenantees.—See “CONVEYANCES,” 5.
10. Default in Payment.—See “SCHOOLS AND SCHOOL-LAND,” 3.
11. Defective Appliance.—See “RAILROADS.”
12. Description in a Deed.—See “TAXATION,” 37.
13. Effect of Non-delivery.—See “RAILROADS.”
14. Heirs.—An action by heirs to recover real property descending to them but sold by an administrator upon an order of court must be begun within five years after the deed is recorded, although the sale be void for want of notice to the heirs. *O’Keefe v. Behrens*, 469
15. Illegal Proceedings.—See “CONTRACTS,” 39, 48, 49.
16. Judicial.—See “EVIDENCE.”
17. Latent Defect.—See “MORTGAGES.”
18. Misconduct of Subordinates.—See “CORPORATIONS,” 15.
19. Presumption.—See “EVIDENCE.”
20. Service upon a Guardian.—See “JURISDICTION.”
21. Transactions by a Cosurety.—See “SURETYSHIP AND GUARANTY,” 17.
22. Void Paving Contract.—See “CONTRACTS,” 39.
23. Waiver.—It was said a party cannot be heard to say that a notice which he expressly waived was not given. *Smyser v. Fair*..... 773

NUISANCE—See “INJUNCTION.”

NURSE HIRE—See “DAMAGES.”

O.

OBJECTION TO EVIDENCE—See “EVIDENCE.”

OBSTRUCTION OF NAVIGABLE STREAM — See
“WATERS AND WATER COMPANIES,” 10.OBTAINING MONEY BY FALSE PRETENSES — See
“CRIMINAL LAW.”

OFFER AND ACCEPTANCE—See “CONTRACTS.”

OFFER OF PAYMENT — See “SURETYSHIP AND GUAR-
ANTY,” 19.

OFFER OF PROOF—See “PRACTICE, DISTRICT COURT.”

OFFICE AND OFFICERS:

1. Appraisers.—An ambiguous report of appraisers, made in the course of proceedings upon which a guardian’s deed is based, will if possible be given a construction that will uphold the deed. *Beachy v. Shomber* 62
2. Assessors.—The statute exempting to the head of a family necessary food for exempt stock does not en-

OFFICE AND OFFICERS—CONTINUED:

- title him to claim, in the absence of food for stock, wheat to be sold to purchase such food. *Voss v. Goss* 120
3. **Charter Board.**—An association to secure its members a burial in consideration of stipulated assessments held to be an insurance association. *The State v. Burial Association*..... 179
4. **Clerk of District Court.**—Where the judge and clerk of the district court are each authorized to do a certain act, and the authority for each act is dependent upon the previous action of the other, either may act first. If the acts follow one another within a reasonable time they will be regarded as done at the same time. *Barnett v. Schad*..... 414
5. **County Clerk.**—Delinquent taxes not chargeable when the certificate is assigned are not a lien upon the land within the meaning of the statute. *Gibson v. Trisler* 397
6. ——— A recital in a tax deed that the county clerk had affixed the seal of the county held a sufficient authentication. *Kruse v. Fairchild*..... 311
7. ——— County clerks are required to obtain from the land-offices abstracts of government lands that have become taxable since March of the previous year. *Id.*, 310
8. **County Commissioners.**—A contract for the publication of the personal-property statements of all persons in the county returned by the assessors held to be *ultra vires* and void. *Brown v. The State*..... 69
9. ——— Injunction will lie to prevent the payment of the contract price. *Id.*..... 69
10. ——— In suits to foreclose a lien for delinquent taxes separate proceedings against individual tracts are permissible. *Whitney v. Morton County*..... 502
11. ——— In many instances there should be a joinder, and the court can so order, on request, to aid in minimizing costs, unless controlled by some paramount consideration. *Id.*..... 502
12. ——— If the action of the county commissioners in ordering separate proceedings should result in palpable wrong, the court may tax any unjust increase in costs so made to the plaintiff. *Id.*..... 502
13. ——— A defective statement of the change prayed for will not render void a petition for the alteration of a public road, where the purpose of the petition can be gathered from the language used. *Wisner v. Barber County* 324
14. ——— A sheriff held not entitled to recover compensation for the service of deputies in excess of that authorized by the statute. *Decatur County v. Leaman* 785
15. **County Treasurer.**—Delinquent taxes not chargeable when the certificate is assigned are not a lien upon the land within the meaning of the statute. *Gibson v. Trisler* 397

OFFICE AND OFFICERS—CONTINUED:

16. *De Facto*.—One claiming to act as a judge *pro tem*. of a city court held to be a *de facto* officer, whose acts and judgments could not be collaterally attacked. *Briggs v. Voss*..... 418
17. *Insurance Commissioner*.—An association to secure its members a burial in consideration of stipulated assessments held to be an insurance association. *The State v. Burial Association*..... 179
18. *Judge of City Court*.—See No. 16.
19. *Judge of the District Court*.—See "PRACTICE, DISTRICT COURT."
20. *Justice of the Peace*.—See "PRACTICE, JUSTICE OF THE PEACE."
21. *Managing Agents*.—See "AGENCY."
22. *Railroad Commissioners*.—See "RAILROADS."
23. *Secretary of Corporation*.—See "CORPORATIONS," 1.
24. *Sheriff*.—In a suit to enjoin a sheriff from selling real estate under an execution issued on a money judgment the judgment creditor is a proper but not a necessary party. *Barnett v. Schad*..... 414
25. ——— An original proceeding to remove a sheriff from office dismissed because the controversy could better be heard in the district court. *The State v. Welfelt* 791
26. ——— A sheriff held not entitled to recover compensation for the service of deputies in excess of that authorized by the statute. *Decatur County v. Leaman* 785
27. ——— One in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county. *Underwood v. Fosha* 408
28. *Sheriff's Return*.—Where the return upon a notice of default in payment on a school-land contract fails to show that it was served upon "all persons in possession of the lands" such service is defective, and will not support a forfeiture. *Phares v. Gleason*.... 604
29. *Township Board*.—The plaintiffs were entitled to their costs although they had not presented their claim to the township board before beginning the action. *Morrill Township v. Fletchall*..... 787
30. ——— A judgment awarding damages to parents for the death of a child caused by a defective highway affirmed. *Id.*..... 787

OPINION TESTIMONY—See "EVIDENCE."

ORAL AGREEMENT—See "FRAUD."

ORDINANCE (VIOLATION OF SPEED)—See "RAILROADS."

ORIGINAL JURISDICTION—See "JURISDICTION."

OUSTER—See "TAXATION," 44; "INSURANCE."

OWNERSHIP—See "TITLE AND OWNERSHIP."

P.

PARENT AND CHILD—See "CONTRACTS;" "DAMAGES," 73, 89; "SCHOOLS AND SCHOOL-LAND," 1.

PAROL TESTIMONY—See "EVIDENCE."

PARTIAL FAILURE OF CONSIDERATION—See "CONTRACTS," 10.

PARTIAL ILLEGALITY OF CONSIDERATION—See "CONTRACTS," 48-53.

PARTIAL INVALIDITY OF A STATUTE—See "CONSTITUTIONAL LAW."

PARTIAL RECOVERY—See "EJECTMENT."

PARTICEPS CRIMINIS—See "CRIMINAL LAW," 42.

PARTIES:

1. **Actions against the State.**—The state cannot be sued in its own courts except with its own consent, clearly conferred by act of the legislature. *The State v. Appleton* 160
2. ——— The rule is that as statutes giving the power to sue the state are in derogation of a sovereign power they should be construed strictly. *Id.* 164
3. **Administrator.**—See No. 21.
4. **Attitude upon the Record.**—A party cannot be allowed to assume antagonistic attitudes upon the record. *Harrington v. Lowe* 23
5. **Consignee.**—See Nos. 8-10.
6. **Contest of a Will.**—An order probating a will determines its due attestation, execution, and validity, and an interested person must contest the will, if at all, within two years, unless under legal disability. *Keeler v. Lauer* 388
7. ——— A creditor of an heir who claims that the devised property has passed to the heir occupies no better position than the heir himself. *Id.* 388
8. **Conversion.**—Where goods consigned by the owner to an agent were delayed in transit and converted by the carrier the consignee had such a special interest that he could maintain an action for the value of the property. *Railway Co. v. Implement Co.* 295
9. ——— The consignee holds the amount recovered in trust for the owner after deducting his commission. *Id.* 295
10. ——— The consignee is always presumed to have the necessary ownership to sue in conversion until the contrary is shown. *Id.* 299
11. **Creditors.**—See Nos. 6, 7, 14, 21.
12. **Immunity from Process.**—One in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county. *Underwood v. Fosha* 408

PARTIES—CONTINUED:

13. **Improper Joinder.**—See No. 25.
 14. **Injunction—Sheriff.**—In a suit to enjoin a sheriff from selling real estate under an execution issued on a money judgment the judgment creditor is a proper but not a necessary party. *Barnett v. Schad*..... 414
 15. **Mandamus.**—A father whose minor child is living with him may maintain an action in mandamus in his own name to compel a board of education to admit his child to the public school. *Cartwright v. Board of Education* 32
 16. **Necessary.**—See Nos. 14, 24.
 17. **Negotiable Instruments.**—Between the original parties to a bill or note the consideration may always be inquired into. *Deming v. Wallace*..... 291
 - 17a. **Nominal Plaintiff.**—See No. 23a.
 18. **Notice.**—The power of a district judge to correct a judgment entry is not lost by lapse of time and may in his discretion be exercised on his own motion and without notice to the parties affected. *Christisen v. Bartlett* 404
 19. ——— Possibly conditions might arise in which a failure to give notice would tend to show an abuse of discretion. *Id.*..... 407
 20. **Parent and Child.**—See No. 15.
 21. **Partition.**—General creditors are not proper parties to partition proceedings by heirs, and the administrator should not be joined unless under exceptional circumstances. *O'Keefe v. Behrens*..... 480
 22. **Proceeding in Aid of Execution.**—One testifying under a subpoena in a proceeding in aid of execution, who is not made a party and does not intervene to claim the property, is not bound by the order and may afterward litigate his rights. *Honce v. Schram*..... 368
 23. **Proper.**—See Nos. 14, 21.
 - 23a. **Real Party in Interest.**—An attorney who brought unlawful detainer in another's name was estopped to deny that the nominal plaintiff was the real party in interest and entitled to settle the litigation, although defendant had notice that the attorney claimed to be entitled to possession. *Edwards v. Sourbeer*..... 224
 24. **Recovery of Convict's Estate.**—An action to recover property belonging to a convict under sentence and imprisonment for a term less than life can only be maintained by a trustee. *New v. Smith*..... 174
 25. ——— Where an action to recover a convict's estate was brought in the name of a trustee, and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *Id.*..... 174
 26. **Title in Third Party.**—See "EJECTMENT."
- PARTITION**—See "DESCENTS AND DISTRIBUTIONS;" "WATERS AND WATER COMPANIES."
- PARTNERSHIP**—See "ACCOUNTS AND ACCOUNTING," 3; "PETITION," 27, 28.

PART PERFORMANCE—See "FRAUD," 5-7.

PARTY WALL—See "SURVEYS AND BOUNDARIES."

PASSION AND PREJUDICE—See "JURY AND JURORS."

PAVING CONTRACTS—See "CITIES AND CITY OFFICERS," 9, 10, 12.

PAYMENT—See "NEGOTIABLE INSTRUMENTS," 6, 7, 13, 15-18; "CONDITIONS PRECEDENT," 4-7; "JUDGMENTS," 25, 26; "TAXATION," 5; "SCHOOLS AND SCHOOL-LAND," 8.

PEACEABLE ENTRY—See "EVIDENCE."

PECULIAR DANGER (PLACE OF)—See "RAILROADS."

PERJURY—See "EVIDENCE."

PERPETUITIES (RULE AGAINST)—See "WILLS."

PERSONAL INJURIES—See "DAMAGES."

PERSONAL LIABILITY—See "EXECUTORS AND ADMINISTRATORS."

PERSONAL RELATION—See "CONTRACTS."

PETITION:

1. **Agent's Commission.**—A petition for an agent's commission held good against demurrer. *Long v. Thompson* 76
2. **Alteration of a Public Road.**—A defective statement of the change prayed for will not render void a petition for the alteration of a public road, where the purpose of the petition can be gathered from the language used. *Wisner v. Barber County* 324
3. **Amendment.**—See "PRACTICE, DISTRICT COURT."
4. **Amendment—Petition in Error.**—See "PRACTICE, SUPREME COURT."
5. **Bill of Particulars.**—See "PRACTICE, JUSTICE OF THE PEACE."
6. **Breach of Promise.**—In an action for breach of promise to marry, it was not error to deny a motion to strike out evidential facts pleaded in aggravation of damages. *Sramek v. Sklenar* 450
7. ——— Even if such facts are redundant and surplusage, and could be proved without being pleaded, it is within the discretion of the court to strike out or retain them. *Id.* 450
8. ——— Evidence that after a contract to marry had been made the man seduced the woman may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out. *Id.* 450
9. **Construction.**—Where there is no motion to make the petition more definite and certain the pleading must be liberally construed. *Long v. Thompson* 78
10. ——— On a general demurrer, there being no motion to make more definite and certain, a petition should be liberally construed, and the demurrer overruled if the facts stated constitute a cause of action. *Bowersox v. Hall* 99

PETITION—CONTINUED:

11. **Demurrer.**—See "DEMURRER."
12. **Description of Material.**—See No. 29.
13. **Duplicity.**—See "PRACTICE, DISTRICT COURT," 59.
14. **Ejectment.**—Where a petition in ejectment alleges full title, and the answer includes a general denial, coupled with a claim of a fractional interest, the plaintiff, upon proof of partial title, is entitled to a proportionate recovery and to judgment for costs. *Young v. Bigger*..... 146
15. ——— Such a case is not within the provisions requiring a tenant in common in suing a cotenant for possession to allege that defendant has denied his right. *Id.*..... 146
16. **Election of Counts.**—See "PRACTICE, DISTRICT COURT."
17. **Evidential Facts.**—See Nos. 6-8.
18. **Filing Separate Petitions.**—See "PRACTICE, DISTRICT COURT."
19. **Final Determination.**—See Nos. 30, 31; see, also, "DEMURRER," 15-17.
20. **Guardian's Sale.**—A guardian's deed will not be held void upon a collateral attack merely because the petition for leave to sell real estate does not affirmatively show the existence of the conditions which authorize such sale. *Beachy v. Shomber*..... 62
21. **Injunction.**—Where the judge and clerk of the district court are each authorized to do a certain act, and the authority for each act is dependent upon the previous action of the other, either may act first. If the acts follow one another within a reasonable time they will be regarded as done at the same time. *Barnett v. Schad*..... 414
22. ——— Facts tending to show that such business was being located in unnecessarily close proximity to a public highway frequently traveled by plaintiffs, and to the buildings of plaintiffs, are proper allegations in a suit to enjoin such business as a nuisance. *Remsburg v. Cement Co.*..... 66
23. **Motion to Make Definite and Certain.**—See "PRACTICE, DISTRICT COURT."
24. **Motion to Separate and Number.**—See "PRACTICE, DISTRICT COURT."
25. **Motion to Strike from Files.**—See "PRACTICE, DISTRICT COURT," 2, 3.
26. **Objection to Evidence.**—See "EVIDENCE."
27. **Partnership Settlement.**—A petition to recover an amount agreed upon after the dissolution of a partnership held sufficient. *Burley v. Brown*..... 780
28. ——— Upon the settlement of partnership affairs a sum was due to plaintiff, which defendant agreed to pay. In a suit for the amount it was held that plaintiff need not prove that the firm debts had been paid, although the petition so alleged. *Id.*..... 780
- 28a. **Petition in Error.**—See "PRACTICE, SUPREME COURT."

PETITION—CONTINUED:

29. **Public Improvements.**—The requirement that the petition for public improvements shall specifically describe the material is complied with, where vitrified brick is to be used, by using the words "vitrified brick" and describing the standard of quality desired. *Surety Co. v. Brick Co.*..... 196
30. ——— When a petition for public improvements purports to have the requisite number of signers, and a landowner files a written protest, and the mayor and council consider the petition and protest and order the improvements made, their action is a conclusive determination of the sufficiency of the petition. *Railroad Co. v. Kansas City.*..... 571
31. ——— Such landowner cannot question the validity of the proceedings in a suit to enjoin the assessments unless such suit is brought within thirty days from the time the amount of the assessment is ascertained. *Id.*..... 571
32. **Recovery of Money from Agent.**—Where money was paid to plaintiff's agent on a contract for the sale of land, a petition to recover the money on the ground of forfeiture held sufficient against demurrer. *Bowersox v. Hall.*..... 99
33. **Signature.**—An objection that a petition is not signed by the plaintiff has no force where it is signed by his attorneys. *New v. Smith.*..... 178
34. **Surplusage** (See, also, Nos. 7, 28).—Where an action to recover a convict's estate was brought in the name of a trustee, and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *Id.*..... 174

PHYSICIAN—See "EVIDENCE."

PLAINTIFF'S RIGHT (DENIAL OF)—See "EJECTMENT," 9, 10.

PLEADINGS—See "PETITION;" "ANSWER;" "DEMURRER;" "JUDGMENTS;" "PRACTICE, SUPREME COURT," 21, 29, 53-55.

PLEA IN BAR—See "CRIMINAL LAW."

POLICE COURT (APPEAL FROM)—See "PRACTICE, DISTRICT COURT."

POLICE REGULATION—See "PRACTICE, PROBATE COURT," 7.

POPULATION (BASIS OF CLASSIFICATION)—See "CITIES AND CITY OFFICERS," 13-17.

POSSESSION—See "CONVEYANCES," 3, 12-14; "TITLE AND OWNERSHIP," 3-6; "SURVEYS AND BOUNDARIES," 3; "FORCIBLE ENTRY AND DETAINER," 2, 7; "EJECTMENT," 8; "NEGOTIABLE INSTRUMENTS," 15-18; "PRACTICE, DISTRICT COURT," 27; "SCHOOLS AND SCHOOL-LAND," 3; "RAILROADS," 66, 67.

PRACTICE, DISTRICT COURT:

1. **Amendment of Answer.**—In an action of ejectment it was held not to have been an abuse of discretion for the court to allow an amended answer to be filed. *Robertson v. Lombard.*..... 779

PRACTICE, DISTRICT COURT—CONTINUED:

2. **Amendment of Petition.**—An amended pleading which is a mere repetition of one held defective on demurrer may be stricken from the files. *Grand Lodge v. Troutman*..... 35
3. ——— Where an amendment to a petition is made which sets forth additional facts, and a fuller and more explicit statement of the facts alleged in the original petition, and the amendment is made in good faith, a motion to strike from the files because of sameness to the original petition will not lie. *Id.*.... 35
4. **Answer.**—See “ANSWER.”
5. **Appeal from Police Court.**—Upon an appeal from the police court the bond was signed by the defendant alone and approved by the police judge. It was error for the district judge to dismiss the appeal because the bond lacked the signature of a surety. *Ottawa v. Johnson* 165
6. **Argument to Jury.**—Certain remarks of counsel in argument before the jury considered and held to have been proper. *Railway Co. v. Wade*..... 359
7. ——— A new trial was asked for alleged misconduct of the prosecutor in argument. By affidavits an issue of fact as to what he said was raised. Denial of a new trial amounted to a finding against the facts alleged in the motion. *The State v. Campbell*.. 690
8. **Change of Venue.**—Apprehension that a judge is prejudiced is not enough to require a change of venue, but it must satisfactorily appear that prejudice in fact exists. *In re Smith*..... 743
9. **Collection of Delinquent Taxes.**—See “TAXATION.”
10. **Comment upon the Evidence.**—See Nos. 44, 45.
11. **Control of Testamentary Trustee.**—A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Keeler v. Lauer*..... 888
12. **Correction of the Record.**—The power of a district judge to correct a judgment entry is not lost by lapse of time, and may in his discretion be exercised on his own motion and without notice to the parties affected. *Christisen v. Bartlett*..... 404
13. ——— Possibly conditions might arise in which a failure to give notice would tend to show an abuse of discretion. *Id.*..... 407
14. ——— A district judge can correct a judgment entry after the expiration of the term, upon his personal knowledge of what took place. *Id.*..... 401
15. ——— The indorsement by an attorney of a journal entry does not estop the denial of its correctness. *Id.*, 403
16. ——— Where the record does not show upon which of several grounds a demurrer to a petition was sustained, the court may at a subsequent term amend the record to show that fact, if it be established by clear and satisfactory proof. *Martindale v. Battey*..... 92
17. ——— Parol evidence is sufficient to prove that a record of a judgment is erroneous. *Id.*..... 92
18. **Costs.**—See “JUDGMENTS.”

PRACTICE, DISTRICT COURT—CONTINUED:

19. Damages.—See "DAMAGES."
20. Demurrer.—See "DEMURRER."
21. Direction of Verdict.—See No. 91.
22. Disbarment of Attorneys.—See "ATTORNEYS."
23. Dismissal.—See No. 5.
24. Duplicity.—See No. 59.
25. Ejectment.—See "EJECTMENT."
26. Election of Counts.—The technical requirements of criminal pleading are not required in an accusation in disbarment. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated or whether some of them are repeated in several paragraphs is not vital. *In re Smith* 744
27. ——— A count claiming the price of property on the theory that plaintiff has parted with title by sale, and the defendant owns and is entitled to possession, is inconsistent with one asking damages for conversion on the theory that plaintiff owned the property and was entitled to its possession. *Ehram v. Jackman* 486
28. ——— Where an information contains several counts, intended to charge the same offense in different ways, and their allegations are not inconsistent, it is not error to refuse to require the state to elect upon which one it will rely. *The State v. Ricksecker*..... 495
29. Error from Probate Court.—See "JUDGMENTS," 30-35.
30. Evidence.—See "EVIDENCE."
31. Excessive Verdict.—See "DAMAGES."
32. Filing Separate Petitions.—A petition was demurred to on several grounds, including misjoinder and want of facts. The demurrer was sustained for want of facts, but the record did not show on what ground, and judgment was given for defendant, which was affirmed on the ground of misjoinder. The district court had no power at a subsequent term to permit the filing of separate petitions. *Martindale v. Battey* 92
33. Foreclosure.—See "MORTGAGES."
34. Former Jeopardy.—See "CRIMINAL LAW."
35. General Verdict.—See "JURY AND JURORS."
36. Inconsistent Pleadings.—A party cannot be allowed to assume antagonistic attitudes upon the record. *Harrington v. Lowe*..... 23
37. Injunction.—See "INJUNCTION."
38. Instructions.—Where evidence competent as to only one codefendant is admitted over the objection of other codefendants, the court's failure to limit its application is not error where the objecting defendants do not request such limitation. *Sweet v. Savings Bank* 47

PRACTICE, DISTRICT COURT—CONTINUED:

39. ——— It was not error to include a statutory phrase in an instruction. This did not leave the construction of the statute to the jury. *Haines v. Goodlander*..... 191
40. ——— It is not error to refuse to give an instruction when those given embrace in legal effect all that is in the one refused. *Railway Co. v. Brickell*..... 274
41. ——— Where testimony in a criminal case is withdrawn by the court, who states to the jury that whenever testimony is ruled out they are not to consider it, denial of a request for a written instruction to disregard such testimony is not error; and a written instruction to consider all the evidence given is neither erroneous nor misleading. *The State v. Roupetz*..... 663
42. ——— Erroneous instructions relating to murder were immaterial, defendant having been convicted of an inferior crime. *Id.*..... 665
43. ——— An instruction in a criminal case which implies that each juror is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous. *The State v. Logan* 730
44. ——— While the court may not comment upon the weight of the evidence, nor assume the existence or non-existence of controverted facts, it is not precluded from referring to parts of evidence and making concrete applications of the law to them. *Haines v. Goodlander* 184
45. ——— The court should not mislead the jury by singling out and giving undue prominence to a particular fact, nor by unduly emphasizing the contentions of either party, but it is often necessary for the court to speak of important features in the evidence, and advise the jury as to the rules of law applicable to such facts. *Id.*..... 184
46. ——— Where an information contains one good count, and several others which repeat its allegations, with others which are unnecessary and do not change the character of the offense, failure to instruct upon such additional matters will not avail defendant, where no prejudice results to him with respect to his trial upon such good count. *The State v. Ricksecker*, 495
47. Joinder of Actions.—In suits to foreclose a lien for delinquent taxes separate proceedings against individual tracts are permissible. *Whitney v. Morton County* 502
48. ——— In many instances there should be a joinder and the court can so order, on request, to aid in minimizing costs, unless controlled by some paramount consideration. *Id.*..... 502
49. ——— If the action of the county commissioners in ordering separate proceedings should result in palpable wrong, the court may tax any unjust increase in costs so made to the plaintiff. *Id.*..... 502
50. Joinder of Parties.—Where an action to recover a convict's estate was brought in the name of a trustee,

PRACTICE, DISTRICT COURT—CONTINUED:

- and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *New v. Smith*..... 174
51. Judge at Chambers.—See No. 95.
52. Judgments.—See "JUDGMENTS."
53. Judicial Sales.—See "JUDICIAL SALES."
54. Jurisdiction.—See "JURISDICTION."
55. Jury and Jurors.—See "JURY AND JURORS."
56. Law of the Case.—A former judgment of this court holding an indictment sufficient in substance is the law of the case. *The State v. Campbell*..... 689
57. Motion to Make Definite and Certain.—Where there is no motion to make the petition more definite and certain the pleading must be liberally construed. *Long v. Thompson*..... 78
58. Motion to Quash.—The dismissal of an action against one joint defendant in a prosecution for incest to make her a witness for the state is not a ground for quashing the information against the other defendant. *The State v. Learned*..... 328
59. Motion to Separate and Number.—When a petition sets up a cause of action in ejectment and another for rents and profits, a motion separately to state and number should be allowed. *New v. Smith*..... 174
60. Motion to Strike from Files.—See Nos. 2, 3.
61. Motion to Strike Out.—In an action for breach of promise to marry, it was not error to deny a motion to strike out evidential facts pleaded in aggravation of damages. *Sramek v. Sklenar*..... 450
62. ——— Even if such facts are redundant and surplusage, and could be proved without being pleaded, it is within the discretion of the court to strike out or retain them. *Id.*..... 450
63. ——— Evidence that after a contract to marry had been made the man seduced the woman may be considered by the jury in aggravation of the damages for a breach of the contract, and should not be stricken out. *Id.*..... 450
64. New Trial.—New trials may be awarded in criminal cases upon the grounds for which new trials may be granted in civil cases, if such procedure is not inconsistent with other provisions of the criminal code. *The State v. Appleton*..... 160
65. ——— Consideration of questions arising upon the trial refused because the petition in error did not assign as error the denial of a motion for a new trial. *Gas Co. v. Dooley*..... 758
66. ——— The provision authorizing new trials in criminal cases for like causes as in civil cases and the provision for instituting a proceeding to obtain a new trial within one year after final judgment do not authorize a proceeding against the state to set aside a judgment of conviction of a public offense and obtain a new trial. *The State v. Appleton*..... 160

PRACTICE, DISTRICT COURT—CONTINUED:

67. ——— It is not necessary to file a motion for a new trial before bringing to this court for review a decision granting a motion for judgment upon the pleadings and the opening statement of counsel and sustaining an objection to the introduction of evidence. *Wagner v. Railway Co.*..... 283
68. ——— There is no such thing as a new trial of issues of law. *Id.*..... 284
69. ——— When an objection to the introduction of evidence under the pleadings is sustained there can be no investigation, much less determination, of the issues of fact, and a motion for a new trial is not necessary. *Id.*..... 285
70. ——— A demurrer to evidence raises nothing but a question of law, and it is impossible for its decision to be a decision of the issues of fact. *Id.*..... 286
71. ——— A new trial was asked for alleged misconduct of the prosecutor in argument. By affidavits an issue of fact as to what he said was raised. Denial of a new trial amounted to a finding against the facts alleged in the motion. *The State v. Campbell.*..... 690
72. ——— A letter corroborating what defendant had previously sworn to could not have been material to disprove the charge of bribery. *Id.*..... 719
73. ——— Matters passed upon by the trial court when considering a motion for a new trial are not reviewable where the conclusion reached by the trial court is not assailed. *Brewer v. Moyer.*..... 756
74. ——— This court will not reverse an order granting a new trial unless the record shows the order was clearly and manifestly in violation of some principle of law. *Railway Co. v. Fields.*..... 375
75. ——— A new trial will not be ordered unless an erroneous theory of the law has prejudiced the trial. *Ehram v. Jackman.*..... 447
76. **Offer of Proof.**—The practice of allowing oral offers of proof to be made in the presence of the jury is not a good one. Such offers should be made in writing. *Insurance Co. v. Johnson.*..... 569
77. **Order Allowing Injunction.**—Where the judge and clerk of the district court are each authorized to do a certain act, and the authority for each act is dependent upon the previous action of the other, either may act first. If the acts follow one another within a reasonable time they will be regarded as done at the same time. *Barnett v. Schad.*..... 414
78. **Partition.**—See “DESCENTS AND DISTRIBUTIONS;” “WATERS AND WATER COMPANIES.”
79. **Petition.**—See “PETITION.”
80. **Plea in Bar.**—See “CRIMINAL LAW.”
81. **Power to Set Aside Judgment.**—After the expiration of the term at which a judgment is rendered the court has no power to set it aside because of its being based on an erroneous ruling. *Martindale v. Battey* 92

PRACTICE, DISTRICT COURT—CONTINUED:

82. **Proceeding in Aid of Execution.**—See "JUDGMENTS."
83. **Question of Fact.**—Whether the storing of dynamite is a nuisance by reason of inappropriate location held to be a question of fact. *Remsburg v. Cement Co.* 66
84. ——— It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Hall v. Davidson*..... 88
85. ——— When the facts upon which a question of negligence depends are in dispute, the question is one to be answered by the jury. *Railroad Co. v. Brown*.. 233
86. ——— Where the facts are not in dispute, and only one inference or deduction is to be drawn from them, they present a question of law for the court. *Id.*.... 233
87. ——— Redemption from a tax-deed holder and directing him to quitclaim to the legal owner did not conclusively prove that defendant was not the owner. *Hall v. Davidson*..... 88
88. ——— As a matter of law the mere failure of a railroad company for any fixed period to complete a track upon a right of way acquired by condemnation does not work a forfeiture of its rights, where there has been no adverse possession. *Hamlin v. Railway Co.* 565
89. ——— Whether an alleged agent had authority to sign a note was held to be a question for the jury. *Duncan v. Huse*..... 432
90. ——— Upon a demurrer to the evidence, if there is any testimony tending to establish the material facts necessary to sustain the plaintiff's cause of action the demurrer should be overruled. *Id.*..... 432
91. ——— It is error to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case. *Avery v. Railroad Co.*..... 563
92. ——— In a suit to avoid a contract on the ground of fraudulent representations a defense that the representations were so palpably false that the plaintiff could not have been injured thereby raises a question of fact. *Insurance Co. v. Johnson*..... 567
93. **Record—Sustaining Demurrer.**—When a demurrer contains several grounds, and is sustained, the order should show upon what ground the order is made. *Walters v. Chance*..... 682
94. **Reopening Case.**—An application to have a case opened after judgment to permit defendants to make a defense therein properly denied. *Blomberg v. Faulkner* 755
95. **Restraining Order.**—A district judge at chambers has power to dissolve a restraining order granted by a probate judge. *Hurd v. Railway Co.*..... 83
96. **Service upon a Guardian.**—See "JURISDICTION."

PRACTICE, DISTRICT COURT—CONTINUED:

97. **Settlement of Case-made.**—See "JURISDICTION."
98. **Special Findings.**—See "JURY AND JURORS."
99. **Statutory Construction.**—See "STATUTORY CONSTRUCTION."
100. **Trial by Jury.**—See "JURY AND JURORS."
101. **Variance.**—See "EVIDENCE."
102. **Verdict—Sufficiency.**—See "JURY AND JURORS."
103. **Verification.**—See "ANSWER."
104. **Withdrawal of a Defense.**—See No. 84.
105. **Withdrawal of Testimony** (See, also, No. 41).—Where witnesses who were not qualified to testify to market value were permitted to do so the court properly withdrew their testimony from the jury. *Detham v. Irrigation Co.*..... 56

PRACTICE, JUSTICE OF THE PEACE:

1. **Bill of Particulars.**—The bill of particulars involved examined and held not to state a cause of action for trespass on real estate within the meaning of the justices' code. *Wilkins v. Lee*..... 321
2. ——— The bill of particulars should be given a liberal interpretation in favor of jurisdiction. *Id.*..... 323
3. **Forcible Detainer.**—See "FORCIBLE ENTRY AND DETAINER."

PRACTICE, PROBATE COURT:

1. **Administrators.**—See "EXECUTORS AND ADMINISTRATORS."
2. **Administrator's Sale.**—See "JUDICIAL SALES."
3. **Application to Sell Real Estate.**—The notice required to be given to a ward of the hearing of his guardian's application for leave to sell real estate is jurisdictional, and a deed made without notice is void, and subject to collateral attack. *Beachy v. Shomber* 62
4. ——— Where the record shows the giving of a notice to a ward of his guardian's application for leave to sell his real estate, and such notice is unavailing, it cannot be presumed from the fact that the sale was confirmed that any other notice was given. *Id.*... 62
5. ——— A guardian's deed will not be held void upon a collateral attack merely because the petition for leave to sell real estate does not affirmatively show the existence of the conditions which authorize such sale. *Id.*..... 62
6. **Appointment of Guardian.**—Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence. *Foran v. Healy* 633
7. ——— The authority given probate courts (Gen. Stat. 1901, § 3941) to inquire into the sanity of persons in their county is a police regulation, and jurisdiction ends with the adjudication and commitment or discharge of such person. *Id.*..... 633

PRACTICE, PROBATE COURT—CONTINUED:

8. ——— An adjudication under section 3941, legally had, is conclusive upon all persons; and the probate court of the lunatic's permanent residence may act thereon the same as if such adjudication had occurred in that court. *Id.*..... 633
9. ——— Except as limited by statute, probate courts have the same power over the person and estate of lunatics that was formerly possessed by courts of chancery under the common law. *Id.*..... 640
10. ——— In the absence of a statute no notice is necessary to confer authority upon a probate court to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind. *Id.*..... 640
11. **Assets of Estate.**—See "EXECUTORS AND ADMINISTRATORS."
12. **Child's Claim for Services.**—Before a daughter can recover from her mother's estate for services rendered the mother while living with her as a member of the family, there must have been an express contract that such services should be paid for. *Griffith v. Robertson* 666
13. ——— Evidence to support such express contract need not consist of a formal offer and acceptance; it may be established by any competent testimony. *Id.*, 666
14. ——— A party prosecuting a claim against the estate of a deceased person is competent to testify to conversations had between the deceased and a third person in the presence and hearing of the witness. *Id.* 666
15. ——— When a daughter cares for her mother for several years, under an express contract that payment will be provided for in the will of her mother, who dies intestate, the daughter may recover the reasonable value of such services from the estate of the mother. *Id.*..... 666
16. **Consent to a Will.**—See "WILLS."
17. **Control of Testamentary Trustee.**—A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Keeler v. Lauer*..... 388
18. **Proof of Claim.**—See Nos. 12-15.
19. **Report of Appraisers.**—See "PRACTICE, SUPREME COURT."
20. **Wills.**—See "WILLS."

PRACTICE, SUPREME COURT:

1. **Amendment of Petition in Error.**—Leave to amend a petition in error by adding new matter denied because the time within which errors in the case might have been presented had expired. *Brewer v. Moyer*, 756
2. **Amendment of Transcript.**—Where a transcript is in fact filed with the petition in error, and there is a mistake or material omission therein, it is within the jurisdiction of this court to allow an amendment within the year at least. *Kennard v. Alexander*.... 31

PRACTICE, SUPREME COURT—CONTINUED:

3. **Amount in Controversy.**—Several and distinct judgments, each for less than \$100, rendered against different defendants, in favor of the same plaintiff, in one action, cannot be united in a proceeding in error to give the supreme court jurisdiction. *Samp v. Bradon* 279
4. **Appellate Jurisdiction.**—See "JURISDICTION," 81, 82.
5. **Assignments of Error.**—A compliance with rule 10 of this court is necessary to the proper consideration of many questions presented for decision, and cases may be affirmed where this rule is not followed. *Hatch v. Geiser*..... 81
6. ——— No answer having been made to the sixth assignment of error, judgment modified by reducing it to \$15.20. *Spaulding v. Pepper*..... 646
7. ——— Matters passed upon by the trial court when considering a motion for a new trial are not reviewable where the conclusion reached by the trial court is not assailed. *Brewer v. Moyer*..... 756
8. ——— Consideration of questions arising upon the trial refused because the petition in error did not assign as error the denial of a motion for a new trial. *Gas Co. v. Dooley*..... 758
9. ——— Such findings are not printed in the brief or further described, the evidence supposed to support them is not pointed out, and the assignment of error is not argued. Hence the matter will not be considered. *Ehram v. Jackman*..... 447
10. **Briefs.**—See Nos. 5, 9.
11. **Case-made.**—No degree of diligence will excuse the plaintiff in error from filing a transcript or a case-made with his petition in error. The provisions of the statute are jurisdictional and mandatory. *Kenard v. Alexander*..... 30
12. ——— Where a transcript is in fact filed with the petition in error, and there is a mistake or material omission therein, it is within the jurisdiction of this court to allow an amendment within the year at least. *Id.*..... 31
13. ——— Section 4 of chapter 320 of the Laws of 1905 is prospective, and not retrospective, in its operation, and confers no power upon a trial judge who had, prior to the passage of the act, lost jurisdiction to settle a case-made. *Douglas County v. Woodward*, 238
14. ——— Where a motion for a new trial was not necessary the filing of such motion did not enlarge the time within which an extension could be granted to make and serve a case-made and jurisdiction to make the order was lost. *Wagner v. Railway Co.*.... 283
15. **Construction of Contracts.**—See "CONTRACTS."
16. **Construction of the Record.**—See Nos. 31, 32, 36.
17. **Costs.**—See "JUDGMENTS."
18. **Defense Improperly Pleaded.**—See No. 53.
19. **Disbarment of Attorneys.**—See "ATTORNEYS."
20. **Dismissal.**—See Nos. 5, 13, 14.

PRACTICE, SUPREME COURT—CONTINUED:

21. **Failure to Plead Estoppel.**—Where a case is tried as though a question of estoppel were in issue, the fact that it was not formally presented by the pleadings does not prevent its consideration on review. *Edwards v. Sourbeer*..... 224
22. **Filing of Transcript.**—See No. 11.
23. **Findings of Fact.**—See Nos. 43, 47-52.
24. **Former Decision—Law of the Case.**—A former judgment of this court holding an indictment sufficient in substance is the law of the case. *The State v. Campbell* 689
25. ——— Where a case is brought a second time on error to this court the first decision will be deemed the settled law of the case as to all questions actually presented by counsel or existing in the record and necessarily involved in the decision. *Harwi v. Klipfert* 783
26. **General Verdict.**—See "JURY AND JURORS."
27. **Immaterial Error—Instruction.**—Where evidence competent as to only one codefendant is admitted over the objection of other codefendants, the court's failure to limit its application is not error where the objecting defendants do not request such limitation. *Sweet v. Savings Bank*..... 47
28. **Immaterial Error—Judgment.**—A formal defect in a judgment held to be harmless. *Hanrion v. Hanrion*, 29
29. **Inconsistent Pleadings.**—A party cannot be allowed to assume antagonistic attitudes upon the record. *Harrington v. Lowe*..... 23
30. **Issues Not Pleaded.**—See No. 21.
31. **Judgment on Demurrer.**—Where the record does not show on which of several grounds a demurrer was sustained, judgment will be affirmed if any of the grounds set out be well founded. *Martindale v. Battey* 95
32. ——— An erroneous ruling held not void, and because not properly challenged it became final. *Id.*... 95
33. **Limitation of Actions.**—See "LIMITATION OF ACTIONS."
34. **New Trial.**—See "PRACTICE, DISTRICT COURT."
35. **Original Jurisdiction.**—See "JURISDICTION," 78-80.
36. **Presumption as to a Judgment.**—In a trial to the court, where the record does not show upon which of two theories a general judgment was based, one being proper, it will be presumed the judgment was entered upon that theory. *Ross v. Eastham*..... 464
37. **Presumption as to Notice.**—Where the record shows the giving of a notice to a ward of his guardian's application for leave to sell his real estate, and such notice is unavailing, it cannot be presumed from the fact that the sale was confirmed that any other notice was given. *Beachy v. Shomber*..... 62
38. **Presumptions Generally.**—See "EVIDENCE."
39. **Quo Warranto.**—See "JURISDICTION."

PRACTICE, SUPREME COURT—CONTINUED:

40. **Report of Appraisers.**—An ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will if possible be given a construction that will uphold the deed. *Beachy v. Shomber*..... 62
41. **Review of Evidence.**—Evidence held sufficient to sustain a verdict against the managing agents of a trust company for the misappropriation of funds. *Sweet v. Savings Bank*..... 47
42. ——— Evidence held sufficient to uphold a verdict in favor of defendant in an action on a lost note of a deceased maker. *Haines v. Goodlander*..... 183
43. ——— Finding of fraud in the execution of a written contract sustained by the evidence. *Deming v. Wallace* 294
44. ——— Evidence held insufficient to sustain a judgment against a cotenant for rent. *Young v. Bigger*.. 146
45. ——— Evidence in a disbarment proceeding examined and held to support a finding of guilty. *In re Burnette* 626
46. ——— Testimony of moral and professional delinquency held to meet the requirement that more than a preponderance of the evidence is necessary, and to be sufficient to support the judgment of disbarment. *In re Smith*..... 744
47. ——— In an action upon a guaranty of a note, a finding that the guarantor instructed the creditor to place the note in judgment was supported by the evidence. *Crane v. Bank*..... 287
48. ——— Findings by a contest court relating to the physical appearance, conditions and contents of a sack of election ballots sustained, the bag and its contents having been inspected by each of the judges. *Moorhead v. Arnold*..... 132
49. ——— A new trial was asked for alleged misconduct of the prosecutor in argument. By affidavits an issue of fact as to what he said was raised. Denial of a new trial amounted to a finding against the facts alleged in the motion. *The State v. Campbell*..... 690
50. ——— No complaint being made that evidence was improperly rejected, facts found that are within the issues are the facts of the controversy. *Ehrsam v. Jackman* 447
51. ——— Finding by a referee, approved by the court, held not reviewable. *Hanrion v. Hanrion*..... 25
52. ——— The rule that this court will not disturb a finding made upon conflicting evidence applied. *Harris v. Gibson*..... 765
53. **Review of Pleadings.**—An objection that the defense of the statute of frauds was not properly pleaded, raised for the first time in this court, cannot be regarded with favor. *Baldwin v. Baldwin*..... 41
54. ——— It is not necessary to file a motion for a new trial before bringing to this court for review a decision granting a motion for judgment upon the plead-

PRACTICE, SUPREME COURT—CONTINUED:

ings and the opening statement of counsel and sustaining an objection to the introduction of evidence. *Wagner v. Railway Co.*..... 283

55. ——— There is no such thing as a new trial of issues of law. *Id.*..... 284

56. **Second Review.**—See Nos. 24, 25.

57. **Special Findings.**—See “JURY AND JURORS.”

58. **Statutory Construction.**—See “STATUTORY CONSTRUCTION.”

59. **Temporary Injunction.**—An order vacating a temporary injunction is reviewable. *The State v. Tibbits* 495

60. **Trial De Novo.**—See “JURISDICTION.”

61. **Variance.**—See “EVIDENCE.”

62. **Verdict and Evidence.**—See Nos. 41, 42, 44-46.

63. **Verdict—Sufficiency.**—See “JURY AND JURORS.”

PREJUDICE OF THE JUDGE—See “PRACTICE, DISTRICT COURT,” 8.

PRESENTATION—See “NEGOTIABLE INSTRUMENTS.”

PRESUMPTIONS—See “EVIDENCE;” “PRACTICE, SUPREME COURT.”

PRINCIPAL AND AGENT—See “AGENCY.”

PRINCIPAL AND SURETY—See “SURETYSHIP AND GUARANTY.”

PRIVATE CORPORATIONS—See “CORPORATIONS;” “RAILROADS;” “INSURANCE.”

PRIVILEGED COMMUNICATION—See “EVIDENCE.”

PRIVILEGE OF A WITNESS—See “EVIDENCE.”

PROBABLE CAUSE—See “DAMAGES.”

PROBATE COURT—See “PRACTICE, PROBATE COURT;” “JURISDICTION.”

PROCEEDING IN AID OF EXECUTION—See “JUDGMENTS.”

PROCEEDING IN ERROR—See “PRACTICE, SUPREME COURT;” “LIMITATION OF ACTIONS.”

PROCESS—See “JURISDICTION;” “INJUNCTION,” 4.

PROFITS (ACCOUNTING FOR)—See “SURETYSHIP AND GUARANTY.”

PROMISE (NEW)—See “LIMITATION OF ACTIONS.”

PROMISE TO MARRY—See “HUSBAND AND WIFE.”

PROMISSORY NOTES—See “NEGOTIABLE INSTRUMENTS.”

PROOF—See “EVIDENCE.”

PROSPECTIVE STATUTE—See “STATUTORY CONSTRUCTION.”

PUBLICATION OF TAX LISTS—See “CONTRACTS.”

PUBLIC CORPORATIONS—See "CITIES AND CITY OFFICERS;" "OFFICE AND OFFICERS;" "SCHOOLS AND SCHOOL-LAND."

PUBLIC IMPROVEMENTS—See "CITIES AND CITY OFFICERS."

PUBLIC ROADS—See "HIGHWAYS."

PUBLIC SCHOOLS—See "SCHOOLS AND SCHOOL-LAND."

PUNITIVE DAMAGES—See "DAMAGES."

PUNCTUATION—See "STATUTORY CONSTRUCTION."

PURCHASE-PRICE (ASCERTAINING VALUE)—See "JURY AND JURORS," 13.

Q.

QUESTION OF FACT—See "PRACTICE, DISTRICT COURT."

QUIETING TITLE—See "TITLE AND OWNERSHIP," 32, 33.

QUITCLAIM DEED—See "CONVEYANCES."

QUO WARRANTO—See "JURISDICTION."

R.

RAILROADS:

1. **Assumption of Risk.**—See No. 42.
2. **Burden of Proving Negligence.**—See Nos. 51, 55.
3. **Clearing Right of Way.**—See No. 38.
4. **Closing a Crossing.**—See Nos. 84, 85.
5. **Commissioners.**—In giving the board of railroad commissioners supervision over railroads operated by steam the statute by implication denies them power over railroads operated only by electricity. *Railroad Co. v. Railroad Commissioners*..... 168
6. ——— In defining "railroad company" to mean a road operated by steam, the statute forbids such term's being construed to include a road operated only by electricity, except where such intention may be expressly manifested. *Id.*..... 168
7. ——— The authority given railroad commissioners to determine applications by one company for permission to cross the tracks of another does not apply where the line sought to be crossed is operated only by electricity. *Id.*..... 168
8. ——— A railway constructed to be operated only by electricity is not a railroad operated by steam within the statutory meaning, although owned and managed by a corporation authorized to use steam power. *Id.*, 168
9. ——— The railroad commissioners have no jurisdiction to entertain an application by a railroad company for leave to cross its track with that of a company using only electricity as a motive power. *Id.*... 168
10. ——— The act limiting the power of the railroad commissioners to roads operated by steam was passed in 1883. The act was remodeled in 1891. A failure

RAILROADS—CONTINUED:

- then to modify the limitation indicated a purpose to confine the board's jurisdiction to that originally given, notwithstanding the modern use of electricity. *Id.* 172
11. **Condemnation Proceedings.**—As a matter of law the mere failure of a railroad company for any fixed period to complete a track upon a right of way acquired by condemnation does not work a forfeiture of its rights, where there has been no adverse possession. *Hamlin v. Railway Co.* 565
12. ——— A contract by a railroad company reserving to a landowner an undergrade crossing, which was taken into account by the condemnation commissioners in the award of damages, is binding on both parties. *Railway Co. v. Wynkoop* 590
13. ——— The landowner cannot insist that the opening shall remain in the same form, nor as wide as it was originally left, but is entitled to such an undergrade crossing as will meet the ordinary necessities of a farm. *Id.* 595
14. ——— Condemning as much land as was then deemed necessary did not exhaust defendant's power to make a further appropriation. *Hurd v. Railway Co.* 86
15. **Contributory Negligence.**—See Nos. 46, 47, 53-55, 61.
16. **Conversion.**—See Nos. 63-67, 70.
17. **Crossing of Tracks.**—See Nos. 5-10.
18. **Damages—Contemplation of Parties.**—See Nos. 58, 68, 69.
19. **Damages in Excess of Freight.**—See Nos. 66, 67.
20. **Death by Wrongful Act.**—A verdict for damages for death by wrongful act held excessive, where it appeared that deceased was sixty-six years old, with no one legally dependent upon him, and in poor circumstances. *Railway Co. v. McLaughlin* 248
21. ——— Where income is the test of the measure of damages the income must be that derived from the personal exertions of the deceased in his business as distinguished from income from property or investments. *Id.* 251
22. ——— Where facts warrant a recovery for the loss of a parent's counsel and services it is held that the damages must be limited to such as would be of pecuniary value. *Id.* 254
23. ——— In an action for damages for a death by wrongful act the trial court erred in sustaining a demurrer to the plaintiff's evidence. *Hurdle v. Railway Co.* 769
24. ——— The provisions of an ordinance regulating the speed at which cars should be operated were said to refer to ordinary operation, and not to exceptional acts in clearing the tracks of snow. *Billings v. Railroad Co.* 757
25. ——— Where an ordinance required railroad-tracks to be constructed level with street grades, but there —

RAILROADS—CONTINUED:

- was no proof of the violation of the ordinance, it was not error to exclude testimony that defendant's track was above the surface of the street. *Id.*..... 757
26. **Demurrer to Evidence.**—See Nos. 23, 36.
27. **Evidence of Pain.**—See No. 44.
28. **Excessive Verdict.**—See Nos. 20, 43.
29. **Forfeiture of Right of Way.**—See No. 11.
30. **Frightening a Team.**—See Nos. 59, 60.
31. **Injunction—Appropriation of Land.**—Making a survey for a switch, which if built would injure plaintiff, did not authorize a temporary injunction, as it did not appear that defendant intended to appropriate the ground illegally. *Hurd v. Railway Co.*..... 83
32. ——— Defendant had a right to enter plaintiff's ground with a view of selecting the most advantageous route. *Id.*..... 86
33. ——— Mere apprehension or a possibility of wrong and injury is ordinarily not enough to warrant an injunction, but there should be at least a probability of wrongful action and irreparable injury. *Id.*..... 84
34. **Injunction—Jurisdiction.**—A suit to enjoin the closing of an undergrade crossing of a railroad operates *in personam*, and is not one of those required to be brought in the county in which the subject of the action is situated. *Railway Co. v. Wynkoop.*..... 590
35. ——— This is not an action to recover real property, nor for the determination of an interest therein. *Id.*, 592
36. **Injury at Crossing.**—It is error to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case. *Avery v. Railroad Co.*..... 563
37. **Injury by Fire.**—In an action for damages resulting from a fire started by defendant's engine, judgment for defendant affirmed. *Bishop v. Railway Co.*..... 761
38. ——— A railway company held liable for the burning of a building through the negligence of its employees in setting out a fire to clear the company's right of way. *Railway Co. v. Fithian.*..... 784
39. **Injury to Employee.**—Before an employee can recover for injuries resulting from a defective appliance on a locomotive, of which the company had no actual knowledge, he must show that it had existed for such a length of time that the company should have discovered and remedied it. *Railway Co. v. Dorr.*..... 486
40. ——— Where a second effort to obtain a specific answer failed, it is not to be presumed that a better result would have been obtained by still other efforts; nor did the defendant waive its right to object to the finding by failing to request to have the effort repeated. *Id.*..... 487
41. ——— There was a finding that the injury would not have occurred but for the defect; that the company had no actual knowledge of its existence; that

RAILROADS—CONTINUED:

- it had existed "for some time previous to the accident." Held that the latter finding is too indefinite to support a recovery. *Id.*..... 486
42. ——— Plaintiff, who was a machinist's helper and was injured by a chip which flew from a steel chisel, assumed the risk of his employment; and as he was a man of maturity, the omission to warn him of the danger was not culpable negligence. *Railway Co. v. Weikal* 763
43. **Injury to Licensee.**—Where the testimony warranted damages for physical and mental pain, loss of time, and permanent injury, and the general verdict was reasonable, but in answer to special questions relating only to mental suffering the jury said the entire sum was allowed for that element, the failure to allow for other elements of damages did not indicate passion or prejudice, and the verdict was not excessive. *Railway Co. v. Wade*..... 359
44. ——— Testimony by physicians and others of expressions of pain by plaintiff held admissible. *Id.*..... 360
45. ——— A person while upon premises controlled by an elevator company, with its consent, is not a trespasser as to a railway company that owns the land upon which the elevator building stands. *Railway Co. v. Taylor*..... 482
46. ——— Held that contributory negligence was not a good defense to an action for injuries to one licensed to be upon property controlled by an elevator company but owned by the defendant. *Id.*..... 482
47. ——— We do not understand it to be the duty of a person, when rightfully in a place, which under ordinary circumstances is safe, to anticipate danger which arises from the negligence of another. *Id.*.... 485
48. **Injury to Passenger.**—When the facts upon which a question of negligence depends are in dispute, the question is one to be answered by the jury. *Railroad Co. v. Brown*..... 233
49. ——— Where the facts are not in dispute, and only one inference or deduction is to be drawn from them, they present a question of law for the court. *Id.*.... 233
50. ——— When a passenger-train is approaching a station, and after the brakemen have called the name of the station, it is not negligence for the trainmen to open the side door and floor door of a vestibule and leave them while open till the station is reached. *Id.*, 233
51. ——— Where there are no witnesses to a death which occurs to a passenger, and circumstances are sufficient to justify the conclusion that the cause of the death was wrongful, the jury may infer ordinary care on the part of the injured person from the instinct of self-preservation. *Id.*..... 235
52. ——— In an action for injury to a passenger it was not shown that a running of the train at an illegally high rate of speed contributed to the accident. *Id.*..... 236

RAILROADS—CONTINUED:

53. **Injury to Pedestrian.**—In a personal-injury case, where the inference of contributory negligence seemed justifiable, plaintiff's evidence in rebuttal was not subject to the objection that it based one presumption upon another. *Railway Co. v. Brickell*..... 274
54. ——— Where plaintiff's evidence was demurred to on the ground of contributory negligence, the demurrer was properly overruled. *Id.*..... 274
55. ——— An instruction as to the burden of proving contributory negligence was proper when considered with other instructions given. *Id.*..... 278
56. **Injury to Stock in Transit.**—A stipulation in a shipping contract that written notice of a claim should precede a recovery for any injury to stock during transportation does not apply to damages such as loss of market or depreciation in the market price occasioned by the carrier's delay. *Railway Co. v. Poole* 466
- 56a. ——— It does apply to shrinkage in weight. *Id.*... 468
57. ——— Agreements of this character are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed. *Id.*..... 468
58. ——— The character of the shipment required the carrier to transport the cattle with reasonable dispatch. *Id.*..... 469
59. **Injury to Traveler.**—Where a private road crosses a railroad-track by means of a subway, the omission to give warning of the approach of a train affords no ground of recovery for injuries by one whose horse was frightened by a passing train after he had driven through the subway and was traveling on a road parallel with the track. *Railroad Co. v. Morrison*... 265
60. ——— The non-liability of the company is not affected by the fact that the place where the plaintiff's horse was frightened was one of peculiar danger because the road was confined in a narrow lane by a barbed-wire fence. *Id.*..... 265
61. **Injury to Trespasser.**—A trespasser upon a railroad-track who took no precautions, and was injured, held guilty of contributory negligence which barred a recovery. *Limb v. Railroad Co.*..... 220
62. **Lien Extinguished.**—See Nos. 66, 67.
63. **Non-delivery of Freight.**—Where goods consigned by the owner to an agent were delayed in transit and converted by the carrier the consignee had such a special interest that he could maintain an action for the value of the property. *Railway Co. v. Implement Co.* 295
64. ——— The consignee holds the amount recovered in trust for the owner after deducting his commission. *Id.* 295
65. ——— The consignee is always presumed to have the necessary ownership to sue in conversion until the contrary is shown. *Id.*..... 299

RAILROADS—CONTINUED:

66. ——— Where the damages caused by the delay in transit exceed the amount of the freight bill the consignee may demand the delivery without payment of the freight. A refusal to deliver amounts to a conversion. *Id.*..... 295
67. ——— In such a case the carrier's lien is extinguished. *Id.*..... 802
68. ——— Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. *Id.*..... 295
69. ——— A carrier deemed to have had notice that machines consigned were for immediate sale and that a delay in delivery until after the thrashing season would defeat the purpose of the shipment. *Id.*..... 295
70. ——— In an action by a consignee who had sold goods upon commission which had been delayed in transit and converted, the measure of damages was the price at which the goods had been sold. *Id.*..... 295
71. Notice of Claim.—See Nos. 56-58.
72. Notice of Defective Appliance.—See Nos. 39-41.
73. Notice of Effect of Non-delivery.—See Nos. 58, 68, 69.
74. Omission to Give a Signal.—See Nos. 59, 60.
75. Opening Train Vestibule.—See No. 50.
76. Place of Peculiar Danger.—See Nos. 59, 60.
77. Reservation—Right-of-way Contract.—See Nos. 12, 13.
78. Taxation for Public Improvements.—See "CITIES AND CITY OFFICERS," 19, 20.
79. Violation of Speed Ordinance.—See Nos. 24, 52.
80. Waiver—Specific Findings.—See No. 40.

RAPE—See "CRIMINAL LAW."

REAL PARTY IN INTEREST—See "ATTORNEYS."

REASONABLE DOUBT—See "CRIMINAL LAW."

REBUTTAL OF CONTRIBUTORY NEGLIGENCE—See "EVIDENCE."

RECLAMATION OF SUBMERGED LAND—See "WATERS AND WATER COMPANIES."

RECOGNIZANCES—See "BONDS," 1, 2; "DAMAGES," 66.

RECORD—See "PRACTICE, DISTRICT COURT," 12-17, 32, 93; "PRACTICE, SUPREME COURT," 29, 31, 32, 36; "TAXATION," 35, 40.

RECOUNT OF BALLOTS—See "ELECTIONS."

RECOVERY OF CONVICT'S ESTATE—See "TRUSTS AND TRUSTEES."

RECOVERY OF MONEY FROM AGENT—See "PETITION."

RECOVERY OF REAL PROPERTY—See "DESCENTS AND DISTRIBUTIONS."

58—73 KAN.

- RECOVERY *PRO TANTO*—See “CONTRACTS.”
- REDEMPTION—See “MORTGAGES.”
- REENACTMENT—See “STATUTORY CONSTRUCTION.”
- REFILING OF ACCUSATION—See “JURISDICTION.”
- RELEASE—See “SURETYSHIP AND GUARANTY;” “NEGOTIABLE INSTRUMENTS,” 9.
- RELICION—See “WATERS AND WATER COMPANIES.”
- RENTS AND PROFITS—See “SURETYSHIP AND GUARANTY,” 17; “PRACTICE, DISTRICT COURT,” 59; “PRACTICE, SUPREME COURT,” 44.
- REOPENING CASE—See “PRACTICE, DISTRICT COURT.”
- REPEAL OF A STATUTE—See “CONSTITUTIONAL LAW;” “STATUTORY CONSTRUCTION.”
- REPORT OF APPRAISERS—See “PRACTICE, SUPREME COURT.”
- REPRESENTATIONS (FRAUDULENT)—See “INSURANCE.”
- RESCISSION OF CONTRACT—See “INSURANCE.”
- RESERVATION IN A CONTRACT—See “RAILROADS,” 12, 13.
- RESIDENCE OF ASSIGNEE—See “TAXATION.”
- RES JUDICATA*—See “JUDGMENTS.”
- RESTRAINING ORDER—See “PRACTICE, DISTRICT COURT.”
- RESTRICTING COMPETITION—See “CONTRACTS.”
- RESTRICTIVE INDORSEMENT—See “NEGOTIABLE INSTRUMENTS.”
- RESULTING TRUST—See “MORTGAGES.”
- RETROSPECTIVE STATUTE—See “CONSTITUTIONAL LAW.”
- RETURN (SHERIFF’S)—See “OFFICE AND OFFICERS.”
- REVIEW—See “PRACTICE, SUPREME COURT.”
- REVOCATION OF CONSENT—See “WILLS,” 2.
- RIGHT OF WAY—See “RAILROADS,” 11-13, 38.
- RIPARIAN OWNERS—See “WATERS AND WATER COMPANIES.”
- ROADS—See “HIGHWAYS.”
- RULE AGAINST PERPETUITIES—See “WILLS.”

S.

SALES:

1. **Administrator's Sale.**—See "JUDICIAL SALES."
2. **Commission.**—See "AGENCY;" "MONOPOLIES," 2-4.
3. **Conveyances.**—See "CONVEYANCES."
4. **Execution Sale.**—See "JUDICIAL SALES," 10, 12.
5. **Foreclosure of Mortgage.**—See "MORTGAGES."
6. **Guardian's Sale.**—See "JUDICIAL SALES."
7. **Personal Property.**—See "CONTRACTS;" "FRAUD," 15.
8. **Real Property.**—See "CONTRACTS."
9. **Tax Sale.**—See "TAXATION," 8-11.

SALOON-KEEPER—See "INTOXICATING LIQUORS."

SATISFACTION—See "JUDGMENTS."

SCHOOLS AND SCHOOL-LAND:

1. **Admission of a Minor—Mandamus.**—A father whose minor child is living with him may maintain an action in mandamus in his own name to compel a board of education to admit his child to the public school. *Cartwright v. Board of Education*..... 32
2. **Bribery.**—See "CRIMINAL LAW."
3. **Forfeiture.**—Where the return upon a notice of default in payment on a school-land contract fails to show that it was served upon "all persons in possession of the lands" such service is defective, and will not support a forfeiture. *Phares v. Gleason*..... 604
4. **Separate Schools.**—In the absence of a statute a board of education of a city of the second class has no right to establish separate public schools for white and colored children, or to exclude a pupil for the reason *only* that such pupil is colored. *Cartwright v. Board of Education*..... 32

SEAL OF COUNTY—See "TAXATION."

SECOND REVIEW—See "PRACTICE, SUPREME COURT."

SECOND SALE—See "MORTGAGES."

SECRETARY OF A CORPORATION—See "CORPORATIONS," 1.

SEDUCTION—See "EVIDENCE."

SELF-SERVING DECLARATIONS—See "EVIDENCE."

SEPARATE ESTATE, TRADE OR BUSINESS—See "HUSBAND AND WIFE," 13.

SEPARATE PETITIONS (FILING)—See "PRACTICE, DISTRICT COURT."

SEPARATE SCHOOLS—See "SCHOOLS AND SCHOOL-LAND."

SERVICE OF PROCESS—See "JURISDICTION;" "INJUNCTION," 4.

SERVICES BY PLAINTIFF'S FAMILY—See "DAMAGES."

SET-OFF—See "NEGOTIABLE INSTRUMENTS."

- SETTING ASIDE—See "JUDGMENTS."
 SETTLEMENT OF CASE-MADE—See "JURISDICTION."
 SETTLEMENT OF SUIT—See "ATTORNEYS," 33, 34, 39.
 SHERIFF—See "OFFICE AND OFFICERS."
 SHRINKAGE IN WEIGHT—See "RAILROADS."
 SIGNAL (OMISSION TO GIVE)—See "RAILROADS."
 SIGNATURE—See "PETITION."
 SPECIAL FINDINGS—See "JURY AND JURORS."
 SPECIAL INTEREST—See "AGENCY."
 SPECIAL LAW—See "CONSTITUTIONAL LAW."
 SPECIFIC PERFORMANCE—See "CONTRACTS."
 SPECIFIC PLEA—See "ANSWER."
 SPEED ORDINANCE (VIOLATION OF)—See "RAILROADS."
 SPEEDY TRIAL (RIGHT TO)—See "CRIMINAL LAW."
 STATE—See "PARTIES," 1, 2; "CRIMINAL LAW," 87; "EVIDENCE," 16, 17, 115; "SURVEYS AND BOUNDARIES."
 STATUTE (AMENDMENT OR REPEAL)—See "CONSTITUTIONAL LAW."
 STATUTE (MULTIFARIOUS)—See "CONSTITUTIONAL LAW."
 STATUTE OF FRAUDS—See "FRAUD."
 STATUTE OF LIMITATIONS—See "LIMITATION OF ACTIONS."
 STATUTE (PARTIAL INVALIDITY)—See "CONSTITUTIONAL LAW."
 STATUTE (PROSPECTIVE)—See "STATUTORY CONSTRUCTION."
 STATUTE (RETROSPECTIVE)—See "CONSTITUTIONAL LAW."
 STATUTES CITED, CONSTRUED, OR APPLIED:

CONSTITUTION OF KANSAS:

- Art. 2, § 16—amendment or repeal of statute.....722, 723
 2, § 17—general laws—uniform operation..... 724
 3, § 1, 3—jurisdiction—supreme court..... 616
 3, § 8—jurisdiction—appointment of a guardian, 642
 11, § 4—diversion of a tax.....506, 509
 12, § 1—special act—corporate powers..... 724
 15, §§ 6, 9—homestead—married women's rights.. 18

BILL OF RIGHTS:

- § 10—right to speedy trial..... 695

LAWS OF 1855:

- Ch. 129, art. 3, §§ 15, 17—grand jurors—testimony..702, 703
 129, art. 6, § 17—new trial—criminal..... 162

LAWS OF 1859:

- Ch. 27, § 189—new trial—criminal..... 162
 94—married women's rights.....11, 18
 94, § 2—married women's contracts..... 11

STATUTES CITED, CONSTRUED, OR APPLIED—CONTINUED:

LAWS OF 1888:	
Ch. 124, §§ 5, 26—powers of railroad commissioners.....	171
LAWS OF 1889:	
Ch. 257—agreements in restraint of trade.....	344
LAWS OF 1891:	
Ch. 158—dealing in live stock—combination.....	343, 344
LAWS OF 1897:	
Ch. 265—antitrust law.....	343, 344
LAWS OF 1898:	
Ch. 23, § 13—proceeding in error—limitation.....	255, 256
29—railroad commissioners' act—repeal.....	171
LAWS OF 1899:	
Ch. 101—county printer	70
130—city court of Wichita—judge <i>pro tem</i>	419
LAWS OF 1901:	
Ch. 286, § 37—powers of railroad commissioners.....	171
392—collection of delinquent taxes.....	502, 503
LAWS OF 1905:	
Ch. 68—attorney's lien	105
112—tax bills—street improvements.....	722, 724
167, § 3—Gove county—court-house	506, 507
320, § 1—filing transcript or case-made.....	30
320, § 4—case-made—settlement	238, 239
334—injunction	493
COMPILED LAWS OF 1862:	
Ch. 32, § 189—new trial—criminal	162
141—married women's rights.....	11
141, § 2—married women's contracts.....	11
GENERAL STATUTES OF 1868:	
Ch. 62—married women's rights.....	11, 15, 19
62, §§ 1-4—married women's rights.....	8
62, § 2—married women's contracts.....	11
82, § 210—new trial—criminal	162
119, § 3—common law	19
GENERAL STATUTES OF 1901:	
§ 92—right to speedy trial.....	695
134—amendment or repeal of statute.....	722, 723
135—general laws—uniform operation.....	724
148, 150—jurisdiction—supreme court	616
155—jurisdiction—appointment of a guardian.....	642
205—diversion of a tax.....	506, 509
210—special act—corporate powers.....	724
232, 235—homestead—married women's rights.....	18
395—attorney's lien	105
398—disbarment of attorneys.....	748
401—disbarment of attorneys.....	752
403—disbarment appeal—record.....	610, 611
730—paving—petition—procedure	196, 203, 574
733—petition for paving—final determination.....	574
747—contracts for public improvements—competition	196, 202
766—improvement taxes—objection—limitation.....	573
1041—appeal from police court—bond.....	166

STATUTES CITED, CONSTRUED, OR APPLIED—CON-
TINUED:

GENERAL STATUTES OF 1901:

§ 1194—release of joint maker.....	608
1249—corporations	495
1262—service of process—foreign corporation.....	113
1316—condemnation proceedings—preliminary survey, 86	
1323—sounding of whistle.....	267
1603—powers of a county.....	71-74
1605—powers of county.....	71
1621—powers of county commissioners.....	71-75
1646—powers of county commissioners.....	73, 75
1924—district judge at chambers.....	85
2081—embezzlement	497
2212—bribery	690, 717
2219—information—incest	332
2301—convict—term less than life.....	177
2430 <i>et seq.</i> —agreements in restraint of trade.....	344
2439 <i>et seq.</i> —dealing in live stock—combination..	343, 344
2465—intoxicating liquors—consequential dam- ages	312, 315
3018—exemptions	120, 121
3299—guardian's sale	64
3386—insurance	179
3580—proceeding in error—limitation.....	255-257
3589—fraternal insurance—license tax.....	258
3941—jurisdiction—insanity inquisition, 633, 635, 637, 638	
3945—insanity inquisition	636, 638, 642
3948—insanity inquisition	636
3977, 3978—insanity inquisition	636
4019-4022—married women's rights.....	8
4334—injunction	85
4431-4436—actions defined	612
4444—recovery of real property—limitation.....	65, 469
	470, 477
4450—non-resident—statute of limitations.....	367
4453—bar—statute of limitations.....	263
4476—venue of actions—real property.....	590, 592, 593
4483—service of process—foreign corporation.....	113
4504—service of process—foreign corporation.....	113, 114
4522—petition—duplicity	176
4525—pleading	81
4526—demurrer—separate petitions	94
4528—answer	264
4541—petition—signature	178
4573—pleadings	37, 779
4685—injunctions—temporary	494
4686—injunction	83, 85, 416
4687—injunction	416
4690—injunction	415, 417
4700—injunction	493
4754—new trial	284
4758—new trial—limitation	160, 161, 163, 164
4785—witness—immunity from process.....	411
4926—surety—subrogation	368, 372
4949—execution sale—second sale.....	246
4966—proceeding in aid of execution.....	373
4976—district judge—entering orders.....	371
5019—jurisdiction—supreme court	280
5031—filing transcript or case-made.....	30

STATUTES CITED, CONSTRUED, OR APPLIED—CONTINUED:

GENERAL STATUTES OF 1901:

§ 5042—limitation of actions—proceeding in error.....	31
5055—record—correction of mistakes.....	406
5081—quieting title	261
5082—ejectment—petition	601
5084—ejectment—tenant in common.....	147
5130—contractor's bond—surety.....	197, 207
5132 <i>et seq.</i> —divorce.....	282
5233—jurisdiction—justice of the peace.....	321
5352—abstract of judgment.....	371
5354—appeal from justice's court—bond.....	166
5361—renewal of civil appeal bond.....	166
5396—judgment—bar	387
5521—information—certainty	332
5533—grand jurors—testimony	689, 702, 703
5535—grand jurors—testimony	689, 702, 703
5545—information	333
5652—new trial—criminal	160-164
5665—right to speedy trial.....	694
5666—right to speedy trial.....	688, 693, 695, 735, 739
5713—new trial—criminal	161-163
5721—indictment quashed—appeal by state.....	695
5776—convict's estate—trustee	177
5780, 5781—convict's estate—trustee	177, 178
5967—powers of railroad commissioners.....	171, 173
5974—powers of railroad commissioners.....	168, 169
5997—"railroad company" defined.....	168, 171, 172
6356—forfeiture—school-land	606
7569—taxation.....	310
7575—taxation	310
7599—duties of county commissioners.....	74, 75
7646—taxation	400
7654—taxation	397, 600
7680—tax-deed holder—limitation of action.....	603
7718 <i>et seq.</i> —collection of delinquent taxes.....	502, 508
7720—collection of delinquent taxes.....	504
7722—collection of delinquent taxes.....	505
7864 <i>et seq.</i> —antitrust law.....	343-345, 347
7868-7870—antitrust law	349
7874—antitrust law—construction	346
7880—conveyance—resulting trust	25, 27
7956-7958—contest of will—limitation.....	395
7972—consent to will.....	396
8014—common law	19

STATUTORY CONSTRUCTION:

1. Adopted from Another State.—The rule that the adoption of a statute from another state includes the construction of it by the courts of that state is a general one, to which there are exceptions. *The State v. Campbell* 689
2. — Where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was adopted is opposed to the weight of reason and authority, or against the general policy of our laws, such construction will not be followed. *Id.*..... 689

STATUTORY CONSTRUCTION—CONTINUED:

3. **Bad Grammar.**—The rule that bad grammar will not defeat the operation of a statute is old and well settled. *Smith v. Haney*..... 508
4. **Constitutional Law.**—If a statute be open to two interpretations, under one of which it would be constitutional and under the other unconstitutional, the court will adopt the meaning consonant with validity. *In re Burnette*..... 610
5. **Intoxicating Liquors.**—Persons engaged in a business prohibited by law, which enriches them and makes paupers and criminals of others, have no complaint against a liberal construction of a statute to make them responsible in damages to those injured as a result of the illegal traffic. *Zibold v. Reneer*.... 318
6. **Jury and Jurors.**—It was not error to include a statutory phrase in an instruction. This did not leave the construction of the statute to the jury. *Haines v. Goodlander*..... 191
7. **Partial Invalidity.**—When one part of a statute is in contravention of the fundamental law, the inquiry, so far as relates to the effect of this holding on the remainder, is whether the legislature would have passed such remaining and unobjectionable portion without the obnoxious feature. *Smith v. Haney*, 509
8. **Power to Sue the State.**—The rule is that as statutes giving the power to sue the state are in derogation of a sovereign power they should be construed strictly. *The State v. Appleton*..... 164
9. **Prospective Operation.**—Generally, a statute will be construed as applying to conditions that may arise in the future. *Douglas County v. Woodward*..... 238
10. **Punctuation.**—Punctuation of a statute is not controlling. *The State v. Appleton*..... 162
11. **Reenactment.**—The act limiting the power of the railroad commissioners to roads operated by steam was passed in 1883. The act was remodeled in 1891. A failure then to modify the limitation indicated a purpose to confine the board's jurisdiction to that originally given, notwithstanding the modern use of electricity. *Railroad Co. v. Railroad Commissioners*, 172
12. **Repeal by Implication.**—The statute of 1891 prohibiting combinations to prevent competition among persons engaged in buying and selling live stock is superseded by the general antitrust law of 1897, and is no longer in force. *The State v. Wilson*..... 343
13. **Retrospective Operation.**—An act will not be given a retrospective operation unless the intention of the legislature that it shall so operate is unequivocally expressed. *Douglas County v. Woodward*..... 238
14. **Service of Process.**—Statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended. *Betterment Co. v. Reeves*..... 114

STATUTORY RAPE—See "CRIMINAL LAW."

STRANGER (TITLE IN)—See "EJECTMENT," 13.

STREET-RAILWAYS—See "RAILROADS," 5-10, 53-55.

SUBMERGED LAND—See "WATERS AND WATER COMPANIES."

SUBROGATION—See "SURETYSHIP AND GUARANTY."

SUBWAY CROSSING—See "RAILROADS," 12, 13, 34, 59, 60.

SUFFICIENCY OF EVIDENCE—See "PRACTICE, SUPREME COURT."

SUFFICIENCY OF VERDICT—See "JURY AND JURORS," 29.

SUIT TO QUIET TITLE—See "TITLE AND OWNERSHIP."

SUMMARY OF ACCOUNTS—See "EVIDENCE."

SUMMON (FAILURE TO)—See "JURY AND JURORS."

SUMMONS (TIME FOR ISSUING)—See "INJUNCTION."

SUPREME COURT—See "PRACTICE, SUPREME COURT;" "JURISDICTION."

SURETYSHIP AND GUARANTY:

1. **Accounting for Profits.**—See No. 17.
2. **Action against Guarantor.**—In an action upon a guaranty of a note, a finding that the guarantor instructed the creditor to place the note in judgment was supported by the evidence. *Crane v. Bank*..... 287
3. **Appeal Bond.**—Upon an appeal from the police court the bond was signed by the defendant alone and approved by the police judge. It was error for the district judge to dismiss the appeal because the bond lacked the signature of a surety. *Ottawa v. Johnson*, 165
4. **Capacity of Machinery.**—In a contract to sell mill machinery a provision that a guaranteed capacity shall be demonstrated before payment is not collateral, and the test must be made or waived before an action for the price can be maintained. *Ehram v. Jackman* 435
5. ——— A contract for the sale of machinery held to contemplate a mill-run demonstration of the guaranteed capacity as a condition precedent to the payment of the purchase-price. *Id.*..... 435
6. ——— Where a mill failed to develop a guaranteed capacity by reason of inferior wheat furnished by the buyer, he could not claim the test was conclusive. *Id.* 436
7. ——— Where machinery sold under a guaranteed capacity is used by the buyer, pending a test he is not obliged to bring about and the seller can delay, the test is not waived nor the seller relieved from demonstrating its capacity, if such use does not violate the contract or prejudice the seller's rights. *Id.*, 436
8. **Contingent Offer to Pay.**—See No. 19.
9. **Contractor's Bond.**—Where a contract for paving is void for restricting competition in the purchase of materials, all the proceedings are void, and one furnishing material with knowledge of the facts constituting the illegality cannot recover against the surety on the contractor's bond. *Surety Co. v. Brick Co.*..... 197

SURETYSHIP AND GUARANTY—CONTINUED:

10. — In an action on a surety bond for material furnished to a contractor to pave certain streets, a demurrer to the answer was held to have been improperly sustained. *Atkin v. Coal Co.*..... 768
11. — The legislature may require persons contracting to improve city streets to give bonds executed by some security company authorized to do business within the state. *Parker-Washington Co. v. Kansas City* 722
12. Contribution.—See Nos. 14, 15.
13. Diligence of Creditor.—See No. 20.
14. Payment of a Judgment.—A surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against other sureties jointly liable with him. *Honce v. Schram*..... 368
15. — The payment by one of the sureties against whom it was rendered, and the taking of an assignment to himself, did not operate as a satisfaction of the judgment against the other judgment debtors. *Id.*, 368
16. Release of Guarantor.—See Nos. 19, 20.
17. Sale and Purchase of Securities.—A surety who converted securities into a judgment and purchased at the execution sale, rented the property, and sold it to an innocent purchaser, all without the knowledge of the principal or cosureties, held accountable to them for rents and profits. *Page v. Harper*..... 229
18. Subrogation.—See Nos. 14, 15.
19. Tender of Payment.—An offer by a guarantor to pay an overdue note, accompanied by a display of the money, did not amount to a tender of payment, although the creditor said he preferred the note, the offer being contingent on the creditor's desiring payment. *Crane v. Bank*..... 287
20. — Where a principal offers to pay a debt and payment is not made by reason of the creditor's conduct the surety is discharged. This doctrine does not apply when the offer to pay is made by the surety. *Id.* 290

SURVEYS AND BOUNDARIES:

1. Mistake.—Occupancy of land through a mistake as to the boundary-line cannot set the statute of limitations to running so as to give title by adverse possession. *Mathis v. Strunk*..... 596
2. Navigable River.—See "WATERS AND WATER COMPANIES."
3. Party Wall.—When there is a dispute whether a building stands wholly upon land of its owner, who is in peaceable possession, he may maintain injunction to prevent the adjoining proprietor from using a wall as a party wall until the latter has established his right thereto in proceedings brought for that purpose. *Mathis v. Strunk*..... 595
4. State Boundary.—If a navigable river dividing two states change its position by imperceptible encroach-

SURVEYS AND BOUNDARIES—CONTINUED:

- ment or recession, so that the change cannot be detected while in operation, the boundary follows the shifting thread of the stream. *Fowler v. Wood*..... 511
5. ——— If while at flood stage the lands on one side of a navigable river are visibly degraded or submerged by avulsion, or a new channel is cut, the boundaries of the state and riparian owners remain unchanged. *Id.*..... 511
6. ——— The title to the bed of a navigable river is vested in the state; private ownership in bordering land extends only to the river's margin, and if the position of the stream change imperceptibly the boundary between the land of the state and that of other proprietors follows the movement of the river's edge. *Id.*..... 511
7. Trial by Jury.—See "JURY AND JURORS."

T.

TAXATION:

1. Assignment of Certificate.—See Nos. 38, 42.
2. Authentication of Deed.—See No. 39.
3. Consideration Not Excessive.—See No. 34.
4. Consolidation of Suits.—See Nos. 8-10.
5. Default in Payment.—A condition that a default in the payment of taxes should mature the mortgage debt did not, upon such default, start the statute to running. *Walters v. Chance*..... 682
6. Delinquent Taxes.—Delinquent taxes not chargeable when the certificate is assigned are not a lien upon the land within the meaning of the statute. *Gibson v. Trisler* 397
7. ——— The statute requiring actions to enforce a liability created by statute to be commenced within three years has no application to suits brought to enforce tax liens. *Whitney v. Morton County*..... 502
8. ——— In suits to foreclose a lien for delinquent taxes separate proceedings against individual tracts are permissible. *Id.*..... 502
9. ——— In many instances there should be a joinder and the court can so order, on request, to aid in minimizing costs, unless controlled by some paramount consideration. *Id.*..... 502
10. ——— If the action of the county commissioners in ordering separate proceedings should result in palpable wrong, the court may tax any unjust increase in costs so made to the plaintiff. *Id.*..... 502
11. ——— In a proceeding to foreclose a tax lien the district court shall investigate what taxes have been legally assessed, and an increment to taxes occasioned by a fraudulent valuation should be eliminated. *Id.*, 502
12. Description in a Deed.—See Nos. 34, 37.
13. Dispossession — Ejectment by Holder.— See Nos. 35, 36.

TAXATION—CONTINUED:

14. **Diversion of a Tax.**—An act empowering the commissioners of Gove county to build a court-house held to authorize the use of a part of the general revenue fund. *Smith v. Haney*..... 506
15. ——— Such provision is void by reason of the constitutional provision forbidding the diversion of a tax from the object for which it was levied. *Id.*..... 506
16. ——— Such provision is so related to the other provisions of the act that it cannot be said that the legislature would have passed any of them independently of this one, and the entire act is therefore void. *Id.*... 506
17. **Exemption.**—The statute exempting to the head of a family necessary food for exempt stock does not entitle him to claim, in the absence of food for stock, wheat to be sold to purchase such food. *Voss v. Goss*. 120
18. **Fraudulent Valuation.**—See No. 11.
19. **General Fund.**—See Nos. 14-16.
20. **Government Lands.**—County clerks are required to obtain from the land-offices abstracts of government lands that have become taxable since March of the previous year. *Kruse v. Fairchild*..... 310
21. **Interest.**—See No. 34.
22. **Lien for Taxes.**—See Nos. 6-11, 43, 44.
23. **Limitation of Actions.**—See Nos. 7, 36.
24. **Monthly Assessments.**—See "INSURANCE."
25. **Notice to Owner.**—See No. 37.
26. **Presumption as to Validity.**—See Nos. 40, 41.
27. **Publication of Tax Lists.**—A contract for the publication of the personal-property statements of all persons in the county returned by the assessors held to be *ultra vires* and void. *Brown v. The State*..... 69
28. ——— Injunction will lie to prevent the payment of the contract price. *Id.*..... 69
29. **Public Improvements.**—See "CITIES AND CITY OFFICERS."
30. **Recorded Five Years.**—See Nos. 35, 40.
31. **Residence of Assignee.**—See No. 38.
32. **Seal of County.**—See No. 39.
33. **Tax Bills.**—See "CITIES AND CITY OFFICERS," 17.
34. **Tax Deeds.**—A tax deed held to be good upon its face, the description being sufficient, and the consideration not excessive when interest is computed at the rate in force when the subsequent taxes were paid. *Robertson v. Lombard*..... 779
35. ——— Where a tax deed, valid on its face, has been recorded five years, with the holder in actual possession, and one claiming adversely dispossesses him by force, fraud, or stealth, the holder of the deed may maintain ejectment to regain what was wrongfully taken from him. *Nicholson v. Hale*..... 599
36. ——— The two-year statute of limitations has no application to such a case. *Id.*..... 599

TAXATION—CONTINUED:

37. — The description in a tax deed must indicate the property with reasonable certainty. It must afford the owner fair notice of the tax levied against his property. Deed held void. *Kruss v. Fairchild*... 308
38. — The statute requires the county and state in which the assignee of a tax-sale certificate resides to be inserted in the deed. *Id.*..... 311
39. — A recital in a tax deed that the county clerk had affixed the seal of the county held a sufficient authentication. *Id.*..... 311
40. — Where a tax deed has been recorded more than five years before it is attacked all presumptions are in favor of the regularity of the prior tax proceedings. *Gibson v. Trisler*..... 397
41. — Tax deed is not void for the omission of statutory recitals if by giving other recitals a liberal construction it can be decided that the omission is fairly supplied. *Id.*..... 397
42. — Delinquent taxes not chargeable when the certificate is assigned are not a lien upon the land within the meaning of the statute. *Id.*..... 397
43. **Tenancy in Common.**—A part owner who sued in ejectment allowed to enforce a lien for a proportionate share of taxes paid although he had not pleaded a claim for contribution. *Young v. Bigger*..... 149
44. — A part owner not in receipt of any income from the land, and who has not ousted his cotenant, held entitled to a lien for taxes paid in excess of his proportion, which he may enforce against his cotenant's grantee claiming by a quitclaim deed. *Id.*... 146
45. **Title and Ownership.**—Redemption from a tax-deed holder and directing him to quitclaim to the legal owner did not conclusively prove that defendant was not the owner. *Hall v. Davidson*..... 88

TEMPORARY INJUNCTION—See "PRACTICE, SUPREME COURT."

TENANCY IN COMMON—See "EJECTMENT," 9, 10; "TAXATION;" "PRACTICE, SUPREME COURT," 44.

TENDER OF PAYMENT—See "SURETYSHIP AND GUARANTY."

TERMINATION BY DEATH—See "CONTRACTS."

"TERMS GOOD FIRMS"—See "WORDS AND PHRASES."

TESTAMENTARY TRUST—See "WILLS."

TESTIMONY—See "EVIDENCE."

TESTIMONY (WITHDRAWAL OF)—See "PRACTICE, DISTRICT COURT."

TEST OF MACHINERY—See "ESTOPPEL AND WAIVER."

THREATS OF DECEASED—See "EVIDENCE."

TIME OF THE ESSENCE—See "CONTRACTS."

TITLE AND OWNERSHIP:

1. Accretion.—See "WATERS AND WATER COMPANIES."
2. Action of Conversion.—See "PARTIES."
3. Adverse Possession.—Occupancy of land through a mistake as to the boundary-line cannot set the statute of limitations to running so as to give title by adverse possession. *Mathis v. Strunk*..... 596
4. ——— Where a tax deed, valid on its face, has been recorded five years, with the holder in actual possession, and one claiming adversely dispossesses him by force, fraud, or stealth, the holder of the deed may maintain ejectment to regain what was wrongfully taken from him. *Nicholson v. Hale*..... 599
5. ——— The two-year statute of limitations has no application to such a case. *Id.*..... 599
6. ——— As a matter of law the mere failure of a railroad company for any fixed period to complete a track upon a right of way acquired by condemnation does not work a forfeiture of its rights, where there has been no adverse possession. *Hamlin v. Railway Co.* 565
7. After-acquired Title.—See "MORTGAGES."
8. Alienation.—See "MORTGAGES," 6-8.
9. Assets of Estate.—See "EXECUTORS AND ADMINISTRATORS."
10. Assets—Proceeding in Aid of Execution.—See "JUDGMENTS," 33.
11. Bed and Banks—Navigable River.—See "WATERS AND WATER COMPANIES."
12. Boundaries.—See "SURVEYS AND BOUNDARIES;" "WATERS AND WATER COMPANIES."
13. Colorable Dispute as to Ownership.—See "JUDGMENTS," 33.
14. Condemnation Proceedings.—See "DAMAGES."
15. Defense.—It is only where a statement or admission made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that a court has authority to withdraw it from the jury. *Hall v. Davidson*..... 88
16. Descents and Distributions.—See "DESCENTS AND DISTRIBUTIONS."
17. Ejectment.—See "EJECTMENT."
18. Eminent Domain.—See "DAMAGES," 22-30.
19. Equitable Owner.—One claiming to be an equitable owner held not to be entitled to maintain an action based upon title to the land for the conversion of crops. *Edwards v. Sourbeer*..... 227
20. Evidence.—Evidence of title, legal or equitable, may be received in an action of forcible detainer when necessary to determine the right to possession. *Dineen v. Olson*..... 379
21. ——— Redemption from a tax-deed holder and directing him to quitclaim to the legal owner did not conclusively prove that defendant was not the owner. *Hall v. Davidson*..... 88

TITLE AND OWNERSHIP—CONTINUED:

22. **Executory Contract to Convey.**—Where the insured owns the title to the property insured, and makes an executory contract to convey it, no change has taken place in interest, title or possession within the meaning of such forfeiture clause. *Garner v. Insurance Co.* 128
23. **Final Proof.**—See "HOMESTEADS AND EXEMPTIONS."
24. **Mortgagee.**—See "MORTGAGES;" "DESCENTS AND DISTRIBUTIONS," 1.
25. **Mortgagee in Possession.**—See "EJECTMENT."
26. **Party Wall.**—See "SURVEYS AND BOUNDARIES."
27. **Pleading.**—See "PRACTICE, DISTRICT COURT," 27.
28. **Purchaser at Judicial Sale.**—See "JUDICIAL SALES," 1.
29. **Quitclaim Deed.**—See "CONVEYANCES."
30. **Reclamation of Submerged Land.**—See "WATERS AND WATER COMPANIES."
31. **Reliction.**—See "WATERS AND WATER COMPANIES."
- 31a. **Riparian Owners.**—See "WATERS AND WATER COMPANIES."
32. **Suit to Quiet Title.**—The law does not permit a mortgagor to quiet title against the holder of his mortgage on the naked ground that the right to foreclose the mortgage has become barred by the statute of limitations. *Gibson v. Johnson*..... 261
33. ——— Where a junior lien-holder causes execution to be levied on real estate once sold under foreclosure, and procures a sheriff's deed, he acquires no title and cannot complain of any judgment rendered in a suit by one in possession, after his right of redemption had expired, to quiet title. *Gille v. Enright*..... 245
34. **Tax Deed.**—See "TAXATION."
35. **Tenancy in Common.**—See "EJECTMENT," 9, 10; "TAXATION;" "PRACTICE, SUPREME COURT," 44.
36. **Title in Third Party.**—See "EJECTMENT."
37. **Trial by Jury.**—See "JURY AND JURORS."
38. **Trustee.**—See "TRUSTS AND TRUSTEES."
39. **Warranty.**—See "CONVEYANCES."

TOLLING THE STATUTE—See "LIMITATION OF ACTIONS."

TOWNSHIP BOARD—See "OFFICE AND OFFICERS."

TRANSACTIONS BETWEEN DECEASED AND THIRD PERSONS—See "EVIDENCE."

TRANSCRIPT—See "PRACTICE, SUPREME COURT," 2, 11; "JUDGMENTS," 47.

TRESPASS AND TRESPASSERS—See "RAILROADS," 61; "PRACTICE, JUSTICE OF THE PEACE," 1.

TRIAL BY JURY—See "JURY AND JURORS."

TRIAL (CAUSE REMANDED)—See "JURISDICTION."

TRIAL DE NOVO—See "JURISDICTION."

TRIAL (RIGHT TO)—See "CRIMINAL LAW."

TRIAL (NEW)—See "PRACTICE, DISTRICT COURT."

TROVER AND CONVERSION—See "DAMAGES;" "PRACTICE, DISTRICT COURT," 27.

TRUSTS AND TRUSTEES:

1. **Abuse of Trust.**—See No. 3.
2. **Accounting.**—See "SURETYSHIP AND GUARANTY," 17; "AGENCY," 18.
3. **Control of Court.**—A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Keeler v. Lauer*..... 388
4. **Discretion Given Trustee.**—The large discretion vested in a trustee did not invalidate the will. *Id.*... 388
5. **Duration of Trust.**—A provision in the will that the trust is to terminate and the estate vest in the beneficiaries within twenty-one years, or within the common-law period, does not offend the rule against perpetuities. *Id.*..... 388
6. **Misappropriation of Funds.**—See "AGENCY," 18.
7. **Recovery of Convict's Estate.**—Where an action to recover a convict's estate was brought in the name of a trustee, and the convict was named as a party plaintiff, allegations referring to the convict's right to join were treated as surplusage. *New v. Smith*... 174
8. ——— An action to recover property belonging to a convict under sentence and imprisonment for a term less than life can only be maintained by a trustee. *Id.*..... 174
9. **Resulting Trust.**—Where one lends money upon notes secured by mortgages on real estate, which notes and mortgages he retains in his possession, they are assets of his estate upon his death although made payable to a third person. *Hanrion v. Hanrion*, 25
10. ——— A mortgage of real estate is not a conveyance within the meaning of the statute which provides that when a conveyance is made to one person upon a consideration paid by another no use or trust shall result in favor of the latter, but the title shall vest in the former. *Id.*..... 25
11. **Rule against Perpetuities.**—See No. 5.
12. **Testamentary Trust.**—See Nos. 3-5.
13. **Title to a Draft.**—The fact that a draft charged to have been fraudulently obtained was made payable to defendant "for the use of" the person alleged to have been defrauded did not conclusively show that the defendant acquired title to it only as a trustee. *The State v. Wilson*..... 335

U.

ULTRA VIRES CONTRACTS—See "CONTRACTS;" "CORPORATIONS."

UNIFORM OPERATION—See "CONSTITUTIONAL LAW."

V.

- VALUATION (FRAUDULENT)**—See "TAXATION."
VALUE (MARKET)—See "DAMAGES."
VARIANCE—See "EVIDENCE."
VENDOR AND VENDEE—See "CONTRACTS."
VENUE (CHANGE OF)—See "PRACTICE, DISTRICT COURT."
VERDICT AND EVIDENCE—See "PRACTICE, SUPREME COURT."
VERDICT (DIRECTION OF)—See "PRACTICE, DISTRICT COURT."
VERDICT (EXCESSIVE)—See "DAMAGES."
VERDICT (GENERAL)—See "JURY AND JURORS."
VERDICT (SUFFICIENCY)—See "JURY AND JURORS."
VERIFICATION—See "ANSWER."
VINDICTIVE DAMAGES—See "DAMAGES," 108.
VOID ADMINISTRATOR'S SALE—See "JUDICIAL SALES."
VOID PAVING CONTRACTS—See "CITIES AND CITY OFFICERS."
VOLUNTARY TESTIMONY—See "EVIDENCE."

W.

- WAIVER**—See "ESTOPPEL AND WAIVER."
WARD—See "GUARDIAN AND WARD."
WARRANTY—See "CONVEYANCES."
WATERS AND WATER COMPANIES:
1. **Accretion.**—See Nos. 7-12, 18, 19.
 2. **Avulsion.**—See Nos. 5, 6.
 3. **Boundaries.**—If a navigable river dividing two states change its position by imperceptible encroachment or recession, so that the change cannot be detected while in operation, the boundary follows the shifting thread of the stream. *Fowler v. Wood*. 511
 4. ——— The title to the bed of a navigable river is vested in the state; private ownership in bordering land extends only to the river's margin, and if the position of the stream change imperceptibly the boundary between the land of the state and that of other proprietors follows the movement of the river's edge. *Id.*. 511
 5. ——— If while at flood stage the lands on one side of a navigable river are visibly degraded or submerged by avulsion, or a new channel is cut, the boundaries of the state and riparian owners remain unchanged. *Id.*. 511
- 59—73 KAN.

WATERS AND WATER COMPANIES—CONTINUED:

6. ——— If through the deposit of alluvion upon the former site or other action of the water, land submerged by avulsion be made to reappear, it may be reclaimed if its identity can be established. *Id.*... 512
7. ——— New formations arising from the bed of a river belong to the owner of the bed, and new formations added to a bar or an island in the channel of a river by accretion or reliction belong to the owner of the island or bar. *Id.*..... 512
8. ——— To effect a change of boundary, formations resulting from accretion or reliction must be made to the contiguous land, and must produce an expansion of the shore-line outward from the tract to which they adhere. *Id.*..... 512
9. ——— If the owner of land, a part of which has been submerged, convey the upland and retain title to the remainder, the purchaser, upon the reappearance of the submerged portion, can include it within his boundary only by the process of accretion or reliction. *Id.*..... 512
10. ——— A riparian owner may protect his soil, secure accretions, and erect necessary improvements; but he may not obstruct the main current so as to deflect a navigable stream into a new channel. *Id.*... 512
11. ——— If the channel of a river separating mainland belonging to one proprietor and land formations belonging to another be deflected and fill up so that the two bodies of land join, each owner is entitled to accretions to and relictions from his own shore. If the channel fill up from the bottom, without accretions to or relictions from either side, the boundary is the center of the original channel. *Id.*..... 512
12. ——— Where partition proceedings were had upon the theory that part of the land had washed away, and allotments were made proportional to the quantity that remained, and subsequently the submerged land reappeared, the owners were entitled to partition of the undivided land, with its accretions, on the equitable ground of mistake as to the existence of a part of the subject-matter of the former suit. *Id.*... 513
13. ——— If a private owner grant land, bounding it upon a river, the presumption that it carries title as far as he owns is rebuttable, the question being one of intention; and when the intention is ascertainable from the record of a proceeding, or the face of an instrument, other evidence is inadmissible. *Id.*..... 513
14. **Conveyance—Tract Partly Submerged.**—See No. 9.
15. **Deflection of Stream.**—See Nos. 10, 11.
16. **Encroachment.**—See Nos. 3, 4.
17. **Filling of Channel from Bottom.**—See No. 11.
18. **Island.**—It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. *Fowler v. Wood*... 549
19. ——— The ability to support crops is not the single test of whether a primitive formation will carry the right to accretions. *Id.*..... 549

WATERS AND WATER COMPANIES—CONTINUED:

20. Navigable River.—See Nos. 3-11.
21. Partition of Submerged Land.—See No. 12.
22. Reclamation of Submerged Land.—See Nos. 6, 9, 12.
23. Reliction.—See Nos. 3, 4, 7-11.
24. Rights of Riparian Owners.—See No. 10.
25. Title to Bed and Banks.—See No. 4.

WEIGHT (SHRINKAGE)—See "RAILROADS."

WIFE—See "HUSBAND AND WIFE."

WILLS:

1. Attestation.—See Nos. 5, 6.
2. Consent.—A husband's consent to a will could not be revoked after his wife's death. *Keeler v. Lauer*.. 396
3. ——— A consent that a wife may bequeath and devise more than one-half of her property is not to be regarded as a part of the will, and it is not necessary that it should be admitted to probate. *Id.*..... 388
4. ——— The law does not require that such consent shall specify the particular property nor particularly designate the will to which the consent applies. *Id.*... 389
5. Contest.—An order probating a will determines its due attestation, execution, and validity, and an interested person must contest the will, if at all, within two years, unless under legal disability. *Id.*..... 388
6. ——— A creditor of an heir who claims that the devised property has passed to the heir occupies no better position than the heir himself. *Id.*..... 388
7. Discretion Given Trustee.—See No. 11.
8. Execution.—See Nos. 5, 6.
9. Probate.—See Nos. 3-6.
10. Rule against Perpetuities.—See No. 13.
11. Testamentary Trust.—The large discretion vested in a trustee did not invalidate the will. *Keeler v. Lauer* 388
12. ——— A testamentary trustee is subject to the direction and control of a court of equity, though the will provides that he shall not report to the court. *Id.* 388
13. ——— A provision in the will that the trust is to terminate and the estate vest in the beneficiaries within twenty-one years, or within the common-law period, does not offend the rule against perpetuities. *Id.* 388

WITHDRAWAL OF A DEFENSE—See "PRACTICE, DISTRICT COURT."

WITHDRAWAL OF TESTIMONY—See "PRACTICE, DISTRICT COURT."

WITNESSES—See "EVIDENCE."

WORDS AND PHRASES:

1. "Alienation."—A mortgage in this state, being merely security for a debt, conveys no title and is not an "alienation" within the meaning of the statutes of the United States. *Stark v. Morgan*..... 453

WORDS AND PHRASES—CONTINUED:

2. ——— A mortgage made by a homestead claimant prior to final proof, for any purpose not intended to transfer title in evasion of the statute, is not void nor contrary to law. *Id.*..... 458
3. ——— Such a mortgagor, after acquiring title from the government, will be estopped from defeating the enforcement of the mortgage lien. His after-acquired title inures to the benefit of the mortgagee. *Id.*..... 458
4. "F. O. B. Cars."—Under an agreement to sell merchandise "f. o. b. cars," it is not the duty of the buyer to furnish the cars. *Hurst v. Manufacturing Co.* 422
5. ——— The phrase "f. o. b. cars" means that the seller will do all that is required to accomplish the consignment and shipment of the goods free of expense to the buyer. *Id.*..... 422
6. ——— The courts will take judicial notice of the meaning of the words "f. o. b. cars." *Id.*..... 426
7. "For the Use of."—The fact that a draft charged to have been fraudulently obtained was made payable to defendant "for the use of" the person alleged to have been defrauded did not conclusively show that the defendant acquired title to it only as a trustee. *The State v. Wilson*..... 335
8. "Interest."—The word "interest" in a clause forfeiting an insurance policy for any change in "interest, title or possession" applies only where the insured owns and insures an interest less than title. *Garner v. Insurance Co.*..... 127
9. ——— Where the insured owns the title to the property insured, and makes an executory contract to convey it, no change has taken place in interest, title or possession within the meaning of such forfeiture clause. *Id.*..... 128
10. ——— A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees. *Id.*..... 131
11. "Managing Agent."—A managing agent within the meaning of the term of the statute providing for the service of summons upon a managing agent of a foreign corporation defined. *Betterment Co. v. Reeves*.. 107
12. "Railroad Company."—In defining "railroad company" to mean a road operated by steam, the statute forbids such term's being construed to include a road operated only by electricity, except where such intention may be expressly manifested. *Railroad Co. v. Railroad Commissioners* 168
13. "Terms Good Firms."—The words "terms good firms," in making a contract, construed to mean the weighing of the produce by responsible business men. It was a condition the law would have implied. *Bennett v. Cummings*..... 653

E. G. K. R.

362-62m's 8/5/07

Digitized by Google



